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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether in employment discrimination cases a person who is employed by the defendant, who was never rejected for employment by the defendant, and who alleged that he had been discriminated against solely with regard to promotions and not by means of any procedures used by the defendant in hiring may bring suit under rule 23 of the Federal Rules of Civil Procedure on behalf of a class of persons who were allegedly discriminated against solely with regard to hiring.

2. Whether, in order to rebut the plaintiff's prima facie case in individual employment discrimination suits, the defendant must prove by a preponderance of the evidence that those promoted instead of the plaintiff were better qualified than the plaintiff, or whether defendant must simply articulate legitimate, non-discriminatory reasons for the promotion of persons other than the plaintiff.

PARTIES

General Telephone Company of the Southwest *

Mariano S. Falcon

All Mexican-Americans who were employed by or who sought employment with General Telephone Company of the Southwest at its Irving, Texas location.

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* General Telephone Company of the Southwest has no subsidiaries. The parent company of General Telephone Company of the Southwest is General Telephone and Electronics Corporation. The following list consists of the significant subsidiaries of the parent company, as defined by the Securities and Exchange Commission, including those that have outstanding publicly held issues of securities in the United States:

GTE Products Corporation of Connecticut; GTE Products Corporation; GTE Automatic Electric Incorporated; GTE Automatic Electric Laboratories Incorporated; GTE Lenkurt Incorporated; GTE Credit Corporation; GTE Finance N.V.; GTE Laboratories Incorporated; GTE International Incorporated; GTE Telecommunicazioni S.P.A.; GTE Communications Network Systems Incorporated; GTE Telenet Corporation; GTE Information Systems Incorporated; GTE Telecommunications Systems, Incorporated; Anglo-Canadian Telephone Company; British Columbia Telephone Company; AEL Microtel Limited; Canadian Telephones and Supplies Ltd.; Dominion Directory Company Limited; Quebec-Telephone; General Telephone Company of California; General Telephone Company of Florida; General Telephone Company of Illinois; General Telephone Company of Indiana, Inc.; General Telephone Company of Kentucky; General Telephone Company of Michigan; General Telephone Company of the Midwest; General Telephone Company of the Northwest, Inc.; General Telephone Company of Ohio; General Telephone Company of Pennsylvania; General Telephone Company of the Southeast; General Telephone Company of Wisconsin; GTE Directories Corporation; Hawaiian Telephone Company; GTE Data Services Incorporated; GTE Investment Management Corporation; GTE Realty Corporation; GTE Satellite Corporation; GTE Service Corporation; GTE Shareholder Services Incorporated; Telect Insurance Company Limited.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

General Telephone Company of the Southwest petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment and findings of fact and conclusions of law by the District Court concerning liability were not reported. *See* Appendix at 31a, 43a. The orders of the district court certifying the class and denying motions for decertification of the class also were not reported. *See* Appendix at 45a through 49a. The opinion of the District Court with respect to back pay was reported at 463 F. Supp. 315 (N.D. Tex. 1978). *See* Appendix at 50a. The opinion of the United States Court of Appeals for the Fifth Circuit was reported at 626 F.2d 369 (5th Cir. 1980). *See* Appendix at 1a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 22, 1980. *See* Appendix at 63a. A timely Petition for Rehearing and Rehearing En Banc was denied on October 27, 1980. *See* Appendix at 65a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISION AND STATUTES

The Due Process clause of amendment V of the United States Constitution and rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure are set out in the Appendix at 66a.

STATEMENT

Mariano S. Falcon ("Falcon") applied to and was hired by the Irving, Texas division of General Telephone Company of the Southwest ("General") in July 1969. During 1971 and 1972, he sought and was considered for a promotion to Field Inspector, a management position. He did not receive this promotion, although several non-Mexican-Americans were promoted. He subsequently filed a complaint alleging that General's failure to promote him was the result of General's discriminatory policy toward Mexican-Americans and violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 and 42 U.S.C. § 1981.[1] Falcon did not allege in the complaint (nor at any time during these proceedings) that General discriminated against him with respect to hiring.[2]

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[1] Jurisdiction of the district court was premised on 28 U.S.C. §§ 1343(4), 2201 & 2202 and 42 U.S.C. § 2000e-5(f).

[2] Falcon's EEOC charge likewise did not mention hiring discrimination. Moreover, he testified that he did not even know any Mexican-Americans who had unsuccessfully applied for employment with General. Trial Transcript at 125.

The complaint also stated that Falcon was bringing suit pursuant to rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of all Mexican-Americans who are or might be employed by General at its Irving location. The complaint alleged that General had discriminated against these persons because of their national origin with regard to compensation, terms, conditions, and privileges of employment.

Prior to trial Falcon requested that the trial court certify a class, with Falcon as its sole representative, consisting not only of all Mexican-Americans employed by General but also of all Mexican-Americans who had applied for employment with General. Falcon did not introduce any evidence showing that he could meet the prerequisites to a class action of rule 23(a) of the Federal Rules of Civil Procedure with regard to these unsuccessful applicants. Instead, Falcon argued that no such evidence was necessary because under the Fifth Circuit's "across the board" theory of employment discrimination class actions, if a plaintiff shows himself to be a member of a minority group and an employee of the defendant, he may represent all other minority employees or applicants for employment with the defendant, even if the types of discrimination allegedly suffered by members of the proposed class differ (*e.g.*, discrimination in hiring versus discrimination in promotions). (Fifth Cir. App. at 49-52.) The trial court certified a class under rule 23(b)(2) that included unsuccessful applicants, with Falcon as its sole representative, without holding an evidentiary hearing to determine whether the prerequisites of rule 23(a) were satisfied and without making findings of fact to support its conclusion that Falcon was an appropriate representative of the class. (Fifth Cir. App. at 52.)

General objected that Falcon could not meet the requirements of rule 23(a) with regard to the proposed repre-

sentation of unsuccessful applicants because he had concededly not himself suffered from hiring discrimination and because of the appearance of impropriety arising from the fact that his interests were potentially different from those of this segment of the class. (Fifth Cir. App. at 101-07, 114, 321-24.) Falcon responded that under the across the board approach to employment discrimination class actions it was irrelevant that he had not suffered from hiring discrimination and that the courts in employment discrimination cases "have not recognized the appearance of impropriety where an employee seeks to represent the interests of a prospective employee." (Fifth Cir. App. at 149-52.) The trial court denied all attempts by General to have the class decertified.

The district court bifurcated the trial into liability and remedy stages. At the liability stage, the plaintiff introduced extensive live testimony and documentary evidence concerning his allegations of discrimination in promotions. The sole evidence introduced by Falcon pertaining to hiring discrimination, however, consisted of statistical exhibits comparing the percentage of Mexican-Americans in the total work force of the surrounding area to the percentage of Mexican-Americans in General's work force at its Irving location and statistical exhibits showing a breakdown by race and national origin of the numbers of persons hired by General during certain years. No live testimony concerning the alleged hiring discrimination was introduced by plaintiffs, nor did plaintiffs attempt any comparisons between the number of Mexican-Americans hired by General and the percentage of Mexican-Americans in the relevant applicant pool.

The trial court ruled that General had discriminated against Falcon by not promoting him and had discriminated against the class with respect to hiring, but not with respect to promotions. The trial court filed findings of fact and conclusions of law and ordered certain injunctive relief at that time. At the remedy portion of the

trial, the court ordered General to pay back wages to Falcon and to certain members of the class.

On appeal, the Fifth Circuit affirmed the trial court's decision certifying Falcon as the representative of a class including unsuccessful applicants, holding that under the Fifth Circuit's rule permitting "across the board" attacks on employment discrimination the rule 23(a) prerequisites are satisfied even where an employee complaining of one employment practice seeks to represent persons complaining of different practices.[3] The court of appeals also affirmed the trial court's ruling that General's failure to promote Falcon was discriminatory, holding that General had failed to "prove," in rebuttal to Falcon's prima facie case, that those non-Mexican-Americans promoted after Falcon sought a promotion were "better qualified" than Falcon. Because the district court failed to explain why it had relied upon statistical hiring data without reference to General's evidence concerning applicant flow, the court of appeals did not affirm the district court's decision that General had discriminated against the class with regard to hiring but instead remanded this portion of the case for a reevaluation of the statistical data introduced by the parties.

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[3] The court of appeals stated that Falcon had shown more in common with the class than simply discrimination on the basis of national origin. "He also showed a similarity of interests based on job location, job function and other considerations." Although the trial court did limit the class represented by Falcon to the Irving location, it did not limit the class represented by Falcon to any particular job or type of jobs—he was allowed to represent *all* employees at Irving and applicants for *all* of the jobs at Irving. These jobs differed considerably, ranging in content from the construction job held by Falcon to, for example, clerical and administrative positions. The court of appeals did not specify what "other considerations" it thought relevant.

REASONS FOR GRANTING THE WRIT

I. THE PROPER SCOPE OF THE CLASS

A. The Holding by the Court of Appeals That a Current Employee May Represent Unsuccessful Applicants Conflicts with the Decisions of This Court in *East Texas Motor Freight* and *General Telephone Co. of the Northwest* and with the Decisions of Other Courts of Appeals

Rule 23(a) of the Federal Rules of Civil Procedure establishes four prerequisites to the maintenance of a class action: numerosity, commonality, typicality, and adequacy of representation. The Fifth Circuit has long adhered to the so-called "across the board" theory in employment discrimination class actions to determine whether the commonality, typicality, and adequacy of representation requirements are satisfied. Under this approach, the allegation of the named plaintiff that the employer discriminates against persons in the same protected group as the plaintiff is generally sufficient to meet the commonality, typicality, and adequacy requirements of rule 23(a) and to permit a plaintiff complaining of one type of employment discrimination (*e.g.*, terminations) to represent persons complaining of other types of discrimination (*e.g.*, hiring).[4] The original rationale

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[4] *See, e.g.*, Long v. Sapp, 502 F.2d 34, 42-43 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969). *Cf.* Alexander v. Gino's, Inc., 621 F.2d 71, 75 (3d Cir.), *cert. denied*, 101 S. Ct. 358 (1980) ("The essence of [the across the board] theory is that the named plaintiff may challenge conduct affecting the class even if he himself has not been affected by the conduct . . . . In effect, it loosens the typicality and adequate representation requirements of rule 23(a)(3) and (a)(4)."); Wajda v. Pennsylvania Mut. Life Ins. Co., 80 F.R.D. 303, 307 (E.D. Pa. 1978) (across the board approach "amounts to a judicial relaxation of the Rule 23(a)(2) and (3) requirements of commonality and typicality in Title VII cases"); Rutherglen, *Title VII Class Actions*,

for this special approach to rule 23(a) in employment discrimination actions was that the question whether a racially discriminatory policy exists is a question of fact common to all members of the class and that this single common question satisfies not only the commonality requirement of rule 23(a) but also the typicality and adequacy requirements. *See Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969).

This Court's decision in *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), precludes the continued use of the across the board approach to class actions. There the Court explained that although common questions of law or fact are frequently present in suits alleging discrimination, the inquiry of the trial court may not end with this single conclusion: "[C]areful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *Id.* at 406-07.

This language in *East Texas Motor Freight* has led many courts to reject any further reliance on the across the board theory and to begin to examine employment discrimination suits on a case by case basis to determine whether the rule 23(a) prerequisites are met.[5] As the

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47 U. Chi. L. Rev. 688, 711 (1980) ("failure to define the class by reference to the named plaintiff's individual claim is characteristic of the 'across-the-board' approach to Title VII class actions"; "a conclusory allegation of classwide discrimination is sufficient for certification").

[5] *See, e.g.*, Patterson v. General Motors Corp., 631 F.2d 476, 480 (7th Cir. 1980); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273-76 (4th Cir. 1980); Hill v. Western Elec. Co., 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); *see generally*

court below observed, however, the Fifth Circuit has not read *East Texas Motor Freight* to preclude use of the across the board theory. Instead, the Fifth Circuit has limited *East Texas Motor Freight* to its precise facts—where the class representatives were not discriminated against at all. *See Satterwhite* v. *City of Greenville*, 578 F.2d 987, 993 n.8 (5th Cir. 1978) (en banc), *vacated and remanded on other grounds*, 445 U.S. 940 (1980). In so doing, the Fifth Circuit ignored the language quoted above from the *East Texas Motor Freight* case that was clearly of broader applicability.

The Fifth Circuit's continued adherence to the across the board approach in the present case was not merely abstract error. Any review of the particular facts presented would have required the conclusion that certification of Falcon as the representative of rejected applicants was inappropriate because his claims were not typical of the claims of the class and because he was not an adequate representative of the class.[6]

Rutherglen, *supra* note 4, at 721-23. The Tenth Circuit had rejected the across the board approach prior to this Court's decision in *East Texas Motor Freight*. *See* Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270-71 (10th Cir. 1975).

[6] Because the class claims have not yet been fully tried and because the initial certification of the class and the subsequent refusals by the trial court to decertify the class were erroneous, the class must now be decertified and the remand to the trial court ordered by the Fifth Circuit vacated. *See* East Texas Motor Freight, *supra*, 431 U.S. at 406 n.12. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), is not to the contrary. That case involved only considerations of standing under article III, not the prerequisites of rule 23(a). *See id.* at 405-07. Moreover, in *Geraghty*, but not in the present case, the initial certification of the class was proper.

1. *The Fifth Circuit's Holding That the Claims of a Current Employee Are Typical of the Claims of Unsuccessful Applicants Is Inconsistent with the Approach of This Court in* East Texas Motor Freight *and* General Telephone Co. of the Northwest *and Conflicts with the Decisions of Several Other Courts of Appeals*

In *East Texas Motor Freight*, this Court stressed that the class representative must be a member of the class and must "possess the same interest and suffer the same injury" as the class members. 431 U.S. at 403 (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). More recently, this Court noted that the typicality requirement of rule 23(a) "is said to limit the class claims to those fairly encompassed by the named plaintiff's claims." *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 100 S. Ct. 1698, 1706 (1980). These rulings clearly require that there be an inquiry into whether the named plaintiff's claims are typical of those of the putative class—an inquiry that the Fifth Circuit held that the trial court was not required to conduct in this case. Instead, by a mechanical application of the across the board approach, the Fifth Circuit concluded that *all* requirements of rule 23(a), including the typicality requirement, were satisfied.

Other courts of appeals have inquired into the existence of typicality in similar cases. They have concluded—contrary to the decision below—that current employees' claims generally are *not* typical of the claims of rejected applicants, because there is no factual overlap between the discrimination claims of the current employees and those of applicants.[7] As the First Circuit reasoned in

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[7] *See* DeGrace v. Rumsfeld, 614 F.2d 796, 809-10 (1st Cir. 1980); Hill v. Western Elec. Co., 596 F.2d 99, 101-102 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); EEOC v. Detroit Edison Co., 515 F.2d 301, 310-11 (6th Cir. 1975) ("serious doubt" that such representation is proper) (dictum), *vacated and remanded on other grounds*

DeGrace, in the absence of such a factual overlap there is no "community of interest" between a current employee and rejected applicants in seeking the elimination of discriminatory hiring barriers. Thus, the current employee does not have a sufficient personal self interest in pressing the claims of applicants to safely permit him to act as their representative.[8] *See* 614 F.2d at 809-10. Where, as here,[9] the named plaintiff can establish his own personal claim without resolving a single issue relevant to the hiring claims of rejected applicants, there is no efficiency gained by allowing the representative plaintiff to press hiring claims and the named plaintiff has little incentive to take vigorous actions to protect the interests of unsuccessful applicants.[10] In such cases, the interests

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sub nom. Local 223, Utility Workers of America v. EEOC, 431 U.S. 951 (1977); *cf.* Scott v. University of Delaware, 601 F.2d 76, 87 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) (doubtful after *East Texas Motor Freight* that person not injured by hiring practices can represent class challenging such practices); Chavez v. Tempe Union High School Dist. #213, 565 F.2d 1087, 1094 n.10 (9th Cir. 1977) (individual action; person not suffering hiring discrimination has no standing to raise such claims); *see also* Walker v. World Tire Corp., 563 F.2d 918, 921-22 (8th Cir. 1977).

[8] The First Circuit noted in *DeGrace* that in some cases there may be a significant factual overlap between the claims of applicants and current employees—for example, where the same test is used for making hiring decisions and transfer decisions. *See* 614 F.2d at 809. In such cases, the typicality requirement should not bar a current employee from representing applicants.

[9] None of the evidence presented by Falcon on his promotion claims bore any relevance to the hiring claims of the class. The evidence presented of promotion discrimination was largely live testimony designed to support a disparate treatment theory. The evidence of hiring claims was entirely statistical in nature and, as such, supported a disparate impact theory.

[10] *See* Talley v. Hoechst Fibers Indus., 24 Fair Empl. Prac. Cas. 580, 584-85 (D.S.C. 1979); Williams v. Wallace Silversmiths, Inc., 75 F.R.D. 633, 635 (D. Conn. 1976), *appeal dismissed*, 566 F.2d 364 (2d Cir. 1977); *see generally* Hansberry v. Lee, 311 U.S. 32, 45

of current employees and applicants are so different in kind that claims of current employees may not fairly be said to be typical of the claims of applicants.

2. *The Fifth Circuit's Holding That a Current Employee Is an Adequate Representative of Unsuccessful Applicants Conflicts with the Decision of This Court in* General Telephone Co. of the Northwest *and with a Decision of the Court of Appeals for the Third Circuit*

While it is important that the representative plaintiff have claims typical of those of the class he seeks to represent, it is even more important that the named plaintiff not have interests actually or potentially in conflict with the members of the proposed class: In such cases the class representative would have an incentive to see that those he seeks to represent do not prevail on their claims or do not obtain appropriate redress for their injuries.[11] As this Court made clear in *General Telephone Co. of the Northwest,* the adequate representation requirement is typically construed to preclude a class action where there are such conflicting interests between the named plaintiff and putative class members.[12]

(1940); Patterson v. General Motors Corp., 631 F.2d 476, 481 (7th Cir. 1980); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 474-75, 489 (N.D. Cal. 1978); Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest,* 4 J. Legal Stud. 47, 48-54, 73 (1975); 13 Harv. C.R.-C.L. L. Rev. 175, 189 (1978).

[11] *See generally* Hansberry v. Lee, 311 U.S. 32, 44 (1940); Note, *Due Process Rights of Absentees in Title VII Class Actions: The Myth of Homogeneity of Interest,* 59 B.U. L. Rev. 661, 673-80 (1979).

[12] *See* 100 S. Ct. at 1707; *see also* Sosna v. Iowa, 419 U.S. 393, 403 (1975); East Texas Motor Freight, *supra,* 431 U.S. at 405; *see generally* Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23,* 53 B.U. L. Rev. 406, 410, 418-27 (1973).

Moreover, the Court in *General Telephone Co. of the Northwest* specifically commented upon the existence of potential conflicts of interest between employees and applicants that would preclude the same plaintiff from representing both classes: "In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes." 100 S. Ct. at 1707.

The Third Circuit had earlier reached a similar conclusion. In *Scott* v. *University of Delaware*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 93 (1979), the court held that a current employee could not be an adequate representative of a class of applicants since his interests were necessarily in conflict with those of applicants for two reasons—first, because he had personally benefitted from the hiring procedures he was seeking to attack on behalf of applicants, and, second, because he would have been in sharp competition for contract renewal and tenure with any applicants who might be offered positions as a result of his suit. *Id.* at 86 & n.21.

This case also presents a clear potential conflict.[13] The relief requested by Falcon for promotion discrimination included a requirement that General make good faith efforts to fill its management level positions with Spanish-

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[13] There may be rare cases where the interests of employees and applicants are not necessarily conflicting. *See, e.g.*, Bartleson v. Dean Witter & Co., 86 F.R.D. 657, 671 (E.D. Pa. 1980) (no apparent conflicts where former employee not seeking reinstatement seeks to represent applicants); Kuhn v. Philadelphia Elec. Co., 80 F.R.D. 681, 685 (E.D. Pa. 1978) (no antagonism between named employee plaintiffs and applicants where promotions based on seniority and all named plaintiffs had been hired prior to date for which retroactive seniority could be rewarded to applicants).

surnamed Americans until 5.24% of these positions were held by Spanish-surnamed Americans.[14] Moreover, General had already voluntarily implemented an affirmative action plan under which there were specific minority goals and timetables. (Trial Transcript at 357-58.) Most management positions were filled by internal promotions and these promotions were not made on the basis of seniority. (Fifth Cir. App. at 181, 210, 219, 319.) Finally, promotions within the hourly bargaining unit were not made exclusively on the basis of seniority. (Fifth Cir. App. at 180-81, 283.) In these circumstances, it was in Falcon's interest that the total number of Mexican-American employees be kept low, in order to reduce the number of persons he would be competing with under the pre-existing affirmative action plan and under the plan he had proposed.

Indeed, the facts of this case illustrate the danger of allowing current employees to represent applicants. From the beginning of this case, Falcon has shown little interest in the claims of those allegedly suffering from hiring discrimination. His EEOC charge did not mention hiring discrimination and he testified that he did not know even a single Mexican-American whose application had been rejected by General. At trial, the plaintiff presented only a few exhibits, statistical in nature, pertaining to hiring discrimination; the remainder of his case pertained to claims of discrimination in promotions. Moreover, although Falcon sought specific goals for *promotions* of Mexican-Americans, he sought only increased recruiting efforts as the injunctive remedy for *hiring* discrimination against Mexican-Americans.

The situation is not of concern only to class members: If the findings of hiring discrimination are reversed on

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[14] Fifth Cir. App. at 220. General voluntarily included this provision in its own proposed order governing relief, *id.* at 279, and the trial court ordered this relief. *Id.* at 291.

remand, the apparent conflict of interest between Falcon and applicants, coupled with his lack of knowledge about these claims and his indifferent approach to the presentation of evidence concerning hiring claims at trial, may give rise to assertions by class members that this case should not be given res judicata effect because Falcon was not an adequate representative for purposes of due process. *See* text and notes at notes 19-22 *infra.*[15]

B. The Fifth Circuit's Decision Raises Important and Recurring Questions Concerning Employment Discrimination Class Actions That Urgently Need Resolution by This Court

Many courts and commentators, including the court of appeals in this case, have noted the extraordinary disarray in the lower courts concerning the appropriate approach to rule 23(a) in employment discrimination class actions. *See, e.g., Vuyanich* v. *Republic Nat'l Bank*, 24 Fair Empl. Prac. Cas. 128, 137 & n.10 (N.D. Tex. Oct. 22, 1980); Note, *supra* note 11, at 672. One commentator has concluded that the continuing split of the courts after *East Texas Motor Freight* has "aggravated the chronic uncertainty surrounding the application of rule 23" and has resulted in a situation where "[w]hether any particular case will be certified as a class action depends less on rules of law than on the district judge's selection of precedent." *See* Rutherglen, *supra* note 4, at 724. In addition, as discussed above, the lower courts are in disagreement about the propriety of representation

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[15] For this reason, the Fifth Circuit's remand of the finding of hiring discrimination for further consideration in light of Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), does not affect the need for the grant of certiorari in this case. If the class did not prevail on remand, General would remain subject to collateral attacks on the judgment. If the class did prevail, General would again be forced to appeal the initial certification of the class as improper.

of applicants by current employees. The number of employment discrimination class actions in itself would be sufficient reason for the Court to resolve these recurring questions.[16]

Of course, these issues have broad social importance as well. In rule 23(b)(2) class actions, the homogeneity of the class should render the action binding as a matter of res judicata on all class members.[17] Thus, as Judge Godbold perceptively pointed out in a concurrence to the very first "across the board" opinion by the Fifth Circuit, the certification of an overbroad class action may have "catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class." *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring). Moreover, the combination of disparate claims poses the very real danger that the claims of absent class members will be slighted or overlooked by the named plaintiff and the attorney representing the class. *See Talley* v. *Hoechst Fibers Industries*, 24 Fair. Empl. Prac. Cas. 580, 584 (D.S.C. 1979). Thus, continued utilization of the across the board

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[16] During one recent year Title VII class actions comprised almost twenty-five percent of all class actions filed in federal courts. *See* Annual Report of the Director of the Administrative Office of the United States Courts at A-170 (1980).

[17] *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248-49 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Fed. R. Civ. P., Advisory Committee Notes, 39 F.R.D. at 99, 106 (1966); *but cf.* Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979) (res judicata effect of prior class action does not bar member of class certified under rule 23(b)(2) from bringing subsequent suit for money damages unless he received actual notice of the prior action); *see generally* Note, *supra* note 11, at 685-88.

approach may frustrate, rather than further, the public policy against employment discrimination.[18]

On the other hand, because a class action cannot, consistently with due process, be given binding res judicata effect unless the representative plaintiff had interests in common with the absentees and adequately represented those interests,[19] the certification of very broad classes in employment discrimination cases may well subject defendants to successful collateral attacks from absent class members on judgments entered in their favor in class actions.[20] This would raise substantial questions about the policy of finality of judgments[21] and about the fairness of subjecting defendants to what is, in effect, one-way intervention by absent plaintiffs.[22]

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[18] *See* Shawe, *Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance with Federal Rule of Civil Procedure 23(a)*, 19 Wm. & Mary L. Rev. 469, 486-87 (1978); *cf.* Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 38 (N.D. Cal. 1977) ("'liberal' application of Rule 23 to Title VII cases will not necessarily promote its remedial purposes if it means failure to adhere to and fully enforce the requirements of Rule 23 whose purpose is to balance and protect the rights of all parties, present and absent").

[19] *See* Hansberry v. Lee, 311 U.S. 32, 43-45 (1940); *see generally* Note, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. Pa. L. Rev. 1217 (1975).

[20] *See* Talley v. Hoechst Fibers Indus., 24 Fair Empl. Prac. Cas. 580, 584-85 (D.S.C. 1979); *see, e.g.*, Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 350-52 (E.D. Va. 1976), *vacated on other grounds*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); *see generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974).

[21] *See generally* Note, *supra* note 19, at 1246-49.

[22] *See generally* Fed. R Civ. P., Advisory Committee Notes, 39 F.R.D. at 105-106 (1966); Note, *supra* note 19, at 1242-46; Note, *supra* note 20, at 601 (quoting Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968)): "To facilitate

In addition, as this case vividly illustrates, across the board certification does not necessarily effect an economy of judicial resources by efficiently consolidating claims presenting common issues. Instead, to the extent that this approach permits or requires joint trial of the dissimilar claims of a plaintiff who is an incumbent employee and a class of unsuccessful applicants, it complicates the litigation of the employee's claim and accelerates, if not unnecessarily forces, litigation of the possibly non-existent claims of applicants. *See* Shawe, *supra* note 18, at 488 & n.101.

Finally, Petitioner is not asking that this Court end broad-based class actions in employment discrimination cases; adherence to the requirements of rule 23(a) will not prevent employees with differing factual situations from banding together in a single class where there are significant issues in common and no intra-class conflicts. However, in the absence of an affirmation from this Court that there *are* limitations that are applicable in this and similar commonly occurring situations, some lower courts will persist in applying the across the board theory. And, as many courts and commentators have noted,[23] the availability of the across the board theory can transform every individual claim of discrimination into a sweeping class action, with an enormous increase in the bargaining power of individual plaintiffs and their attorneys.

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successful challenges to the binding effect of class action judgments is to create a postjudgment election to opt out—'a return to one-way intervention under a new guise.' "

[23] *See, e.g.*, Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 479 (N.D. Cal. 1978); Rutherglen, *supra* note 4, at 725-26 & n.214; Shawe, *supra* note 18, at 489-92.

II. THE APPROPRIATE BURDEN OF PROOF FOR INDIVIDUAL CLAIMS

A. The Holding by the Court of Appeals That a Defendant Must Prove That Others Were Better Qualified Than the Plaintiff Conflicts with This Court's Decision in *Sweeney*

In affirming the trial court's ruling that Falcon had proved disparate treatment by General with respect to the denial of his promotion, the Court of Appeals ruled that once Falcon established a prima facie case under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the burden shifted to the defendant to "prove that those hired or promoted were better qualified than the plaintiff." In reaching this conclusion, the court of appeals expressly relied upon *Burdine* v. *Texas Dep't of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979). The holding of the court in *Burdine* requiring the defendant to prove nondiscriminatory reasons for its action by a preponderance of the evidence is inconsistent with this Court's holding in *Board of Trustees of Keene State College* v. *Sweeney*, 434 U.S. 24 (1978), that the defendant need only "articulate," not "prove," the absence of discriminatory motive.

B. The Individual Burden of Proof Issue Should Not Be Set for Oral Argument

This Court has granted certiorari in *Burdine*, *see* 100 S. Ct. 3009 (1980), the case has been argued, *see* 49 U.S.L.W. 3442 (December 9, 1980), and is awaiting decision. The question whether the Fifth Circuit's requirement that a defendant prove nondiscriminatory reasons is consistent with *Sweeney* is squarely presented by the petition for certiorari in *Burdine*. See 48 U.S.L.W. 3823 (1980). Thus, it is likely that this Court will soon decide whether the court of appeals in the present case erred in relying upon *Burdine*.

Under these circumstances, it may be suggested that the appropriate procedure in this case should be for the Court to hold this case pending its disposition of *Burdine*. However, because the issue of the appropriate burden of proof under *Sweeney* relates exclusively to Falcon's individual disparate treatment claim and has no relevance to the class claims, which are premised on a disparate impact theory, this Court's decision in *Burdine* cannot eliminate the rule 23 class certification issues presented by this petition. Therefore, this Court should grant the petition but set only the class certification issues for oral argument; the burden of proof issue can thereafter be considered on remand in light of the Court's decision in *Burdine*.

CONCLUSION

For all of these reasons, the Petitioner requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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January 1981

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-3587

MARIANO S. FALCON,
Plaintiff-Appellee
Cross-Appellant,

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Defendant-Appellant
Cross-Appellee.

Sept. 22, 1980

Appeals from the United States District Court
for the Northern District of Texas

Before TUTTLE, RANDALL and TATE, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from a judgment for the plaintiffs in a class action Title VII employment discrimination suit. We affirm part of the trial court's decision and remand the rest for further proceedings.

This class action, filed originally by Mariano S. Falcon, a Mexican-American, challenged the hiring and promotion practices of the defendant employer, General Telephone Company of the Southwest (General), on the ground that General impermissibly discriminated on the basis of national origin against Mexican-Americans (Spanish speaking Americans).[1] Falcon applied for a

[1] In this opinion, as in the court below and in the briefs, Mexican-Americans and Spanish speaking Americans are used interchangeably.

job with General in July of 1969. He was hired as part of an affirmative action program, and after a training period, he began work as a groundman. After one month, he was promoted to lineman and a short time later, he was promoted to lineman in charge. One year after he was hired, he turned down a promotion to installer-repairman, and he did not receive any other promotion prior to October, 1972, at which time he applied for a promotion to Field Inspector. He did not receive this promotion although several other non-Mexican-Americans with less seniority than Falcon received the promotion. Falcon then filed a complaint with the Equal Employment Opportunity Commission (EEOC) charging that General discriminated in the area of promotions.[2]

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[2] The factual portion of the EEOS charge stated:

"I believe that I have been discriminated because of my national origin—SSA. I have been passed up for promotion to inspector by whites with less seniority and less experience than I have. This is contrary to my union's seniority system as depicted by the Collective Bargaining Agreement. Also, I believe that the Company's promotion policy has operated against a class—SSA."

The attached affidavit of Falcon stated:

"I was hired by General Telephone in July, 1969, as a groundman. A month later I made lineman, and a month later lineman-in-charge. I have received no further advancement.

The normal progression of jobs from bottom to top is as follows: groundman, lineman, lineman-in-charge, inspector, crew foreman, and finally, construction foreman.

My present supervisor, Bill Hamrick (white), made lineman-in-charge the same time I did. He has since become a construction foreman.

Jerry Hoffman (white) was hired in the latter part of 1970 and was promoted from groundman to inspector within six months. Two months later he was made a crew foreman, and two months later a construction foreman.

Randy Railey (white) was hired in the latter part of 1970 and was made an inspector from lineman within a year. He is now an installer-repairman in Carrollton, Texas.

[Footnote continued on page 3a]

He filed suit in early 1975, challenging both the hiring and promotion policies of General in a class action suit. The trial court certified the class, but limited the class to those Mexican-American employees who had applied for employment or were employed in General's Irving, Texas division.

At Phase I of the trial,[3] the district court decided that General had discriminated against the plaintiff with respect to promotion, but not with respect to hiring, and that General had discriminated against the other members of the class with respect to hiring, but not with respect to promotions. The court apparently based its finding of discriminatory hiring on statistics, introduced by the plaintiff, which indicated that Mexican-Americans represented 5.24% of the work force in the Dallas/Fort Worth area, the relevant area for Irving, while only 1.22% of General's employees in 1972 were Mexican-American. The trial court also relied on the fact that 20 Caucasians were hired in 1972, as opposed to no Mexi-

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[2] [Continued]

Jerry Eden (white) was hired in April of 1972 as a lineman. He had seven years experience as a contractor. He was given duties of inspector on September 18, 1972.

I believe that I have been discriminated against by my company's promotional policy because I am SSA. Witnesses who will attest to both my qualifications and the facts in this affidavit are: (1) Bob Ferguson; (2) John Chamberlain—Union Steward of my union, CWA—Communication Workers of America; (3) Rick Schaeffer; (4) Stanly Mann; (5) Mike Wilcox; (6) Willie Baxter; (7) Pete Butler . . . all whites.

Mr. Loy Goldston is my area supervisor and Mr. Rhett Mun is my district supervisor."

[3] The different hearings will be discussed as Phase I, Phase II, etc. At Phase I, the trial court found liability and ordered injunctive relief. At Phase II, the trial court determined damages.

can-Americans, and that in 1973, only 4% of those hired were Mexican-American.[4] *See* note 16 *infra.*

With respect to hiring at Phase I, there was testimony that General had a policy of keeping all applications active for only three months. The court found that none of the applicants were informed of this time limit, that the applicants were not informed as to what positions were open, and that they were not informed as to the quali-

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[4] General presented statistical evidence showing the following, in part:

a) The percentage of General's new hires at its Irving facility which were Mexican-Americans was:

1973	4.0%
1974	13.2%
1975 (through 7/30)	18.8%

b) In the available labor market in the Dallas/Ft. Worth area, the percentage of Spanish-surnamed Americans was 5.24%; in Irving it was 3.6%.

c) The percentage of Mexican-Americans and whites who were hired from the applicant pool for that group.

	Whites	Mexican-Americans
1973	10%	17%
1974	3.3%	17%
1975	0.7%	10.3%

In its brief in this Court, General also argues that both it and the plaintiffs' statistics show the following:

a) *July 1972-June 1976*: 7.73% of those hired at Irving were Mexican-Americans.

b) *1973-1976*: 18.3% of all Mexican-American applicants were hired, although only 2.98% of General's applicants were Mexican-Americans.

c) *1973-1976*: 5.66% of General's white applicants were hired, although 81.5% of the work force in the area was white and

The trial court also found that General employed 526 people, 86.65% of the applicants were white.
but that only one of 66 management employees were Mexican-American. *See* note 16 *infra.*

fications for any of these positions. Thus, General was given the burden of proving at Phase II that there had not been any job openings for which the class members had been qualified after the three month period.[5]

As stated previously, the trial court also decided that Falcon was discriminated against in promotions. The court based its decision there on its finding that General's proferred reasons for promoting the other men, rather than Falcon, were insufficient and subjective. Therefore in Phase I, as a preliminary part of its relief order, the court ordered the defendant to take numerous affirmative action steps and the judge held that the plaintiff and the class were entitled to attorney's fees.

At Phase II of the trial, the court ruled that General had not met its burden of proving that there had been no available openings for the class applicants who wished to be hired after the three month "active" application period. All 13 class members therefore received back pay awards and job security awards to compensate them for the fact that if they had been hired by General, they would have been in a union. The judge also awarded attorney's fees to the plaintiff and class.

Both sides appeal from this judgment. The Appellant, General, bases its appeal on a number of issues. It argues that:

(a) The trial court erred in certifying the class;

(b) The trial court did not have jurisdiction over the discriminatory hiring claim since the EEOC charge related solely to a discriminatory promotion policy claim;

(c) The trial court erred in finding that the plaintiff below had been discriminated against with respect to promotion;

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[5] The court based its burden of proof ruling on the fact that General's hiring policies exacerbated its discriminatory policies.

(d) The trial court erred in finding that the defendant below had discriminated against the class with respect to hiring;

(e) The trial court erred in admitting reports from the General Services Administration (GSA);

(f) The trial court erred in making back pay awards without sufficient evidence that job openings existed for which the class members were qualified;

(g) The trial court erred in finding the application procedure unreasonable;

(h) The trial court awarded too much in back pay;

(i) The trial court awarded too much in attorney's fees.

The appellee, Falcon, argues that:

(a) The trial court erred in limiting the class to those employed in the Irving division;

(b) The trial court awarded too little in back pay.

We shall examine each of these issues in the approximate order they were raised at trial.

I. *Class Certification*

The appellant argues that under Rule 23, the trial court erred in certifying the class at all. On his cross-appeal, Falcon claims that the only error involved in the certification was the trial judge's limiting of the class to Mexican-Americans who are employed at or have applied to the Irving division of General, rather than all of the divisions. We shall examine each of those issues in turn.

The appellant bases its argument on three theories. It says the claim of the class representative was not typical of the claims of the class; that the class representative

could not fairly and adequately protect the interests of the class, and that the questions of law and fact raised by the claims of the class representative were not common to the questions of law and fact raised by the claims of the class. General also argues that the failure of the trial court to hold an evidentiary hearing on this matter may, in itself, require a reversal of certification.

A. *Failure to Hold a Hearing*

General alleges that the failure to hold an evidentiary hearing on the issue of certification requires reversal of the certification, citing *Satterwhite* v. *City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vac. and remanded*, 445 U.S 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980). Falcon says, in opposition, that such a hearing was not necessary.

We disagree with General's contention that the failure to hold such a hearing, in itself, requires a reversal of certification. It is true that this Court has repeatedly stressed the importance and value of such an evidentiary hearing on the certification issue. *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 998 (5th Cir. 1978) (en banc), *vac. and remanded on other grounds*, 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980); *King* v. *Gulf Oil Co.*, 581 F.2d 1184, 1186-87 (5th Cir. 1978); *Huff* v. *N.D. Cass Co. of Alabama*, 485 F.2d 710 (5th Cir. 1973). But such a hearing is important only in the context of showing whether or not a class should have been certified. If later evidence shows the decision to certify to have been a correct one, there was obviously no need to have held such a hearing. *King* at 1186-87. To prevail solely on a contention that a hearing was required, an appellant must show that if a hearing had been held, it could have affected his rights substantially. That can only occur in a situation in which the district court made a decision to deny certification without a hearing, since it is only in that case that a party can show that there was a substan-

tial issue as to certification and that he was denied an effective opportunity to litigate it. We therefore hold that the mere fact that a class has been certified without a hearing is not a ground for reversal of that decision. Even when no hearing is held before certification is granted, a party has an adequate opportunity later to argue the substantive merits of the decision to certify. We therefore turn to the merits of General's arguments concerning certification.

B. *Appellant's Substantive Class Certification*

Although the appellant argues that the class did not meet three of the requirements of Rule 23(a)[6] most of these claims are based on the appellant's contention that Falcon, who was complaining of discrimination with respect to promotion, could not represent a class complaining of discrimination with respect to hiring. General maintains that according to *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), Falcon cannot represent both hiring and promotional discriminatees because he has not established a sufficient nexus between his claims of promotional discrimination and the other class members' claims of hiring discrimination. *See also Scott* v. *University of Delaware*, 601 F.2d 76 (3rd Cir.), *cert. denied* 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 189 (1979); *Hill* v. *Western Electric Co., Inc.*, 596 F.2d 99 (4th Cir.), *cert. denied* 444 U.S. 929, 100 S.Ct. 271, 62 L.Ed.2d 186 (1979).

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[6] Rule 23(a) states:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In contrast, Falcon argues that this Court has not interpreted the nexus requirement of *East Texas Motor Freight* as restrictively as other courts and that, therefore, this action was properly certified under this Court's standards. *See Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir.), *cert. denied* 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); *Vuyanich* v. *Republic National Bank of Dallas*, 82 F.R.D. 420 (N.D.Tex.1979); *Satterwhite* v. *City of Greenville*, 578 F.2d 987 (5th Cir. 1978) (en banc), *vac. and remanded* 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980). Falcon's position is essentially that this Court still permits "across the board" attacks on discrimination.

We agree. In *Payne* v. *Travenol Laboratories, Inc.*; *supra*, this Court said:

> Plaintiffs' action is an "across the board" attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies. (Citations omitted)[7]

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[7] *See also Satterwhite* v. *City of Greenville*, 578 F.2d 987, 993-994 n.8 (5th Cir. 1978) (en banc), *vac. and remanded*, 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1980) in which this Court said:

> . . . Nor is Rodriguez or this opinion contrary to the policy favoring "across the board" Title VII class actions. *See Johnson* v. *Georgia Highway Express* [417 F.2d 1122 (5th Cir.)], *supra*. It is not necessary that the representative suffer discrimination in the same way as other class members, but it is necessary that she suffer from the discrimination in some respects.

As noted, *Satterwhite* was subsequently vacated and remanded by the Supreme Court. In *Satterwhite*, a job bias claimant, an

It is therefore apparent that this Court permits an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin. It is consistent with the holding in *Rodriguez* and the policy of Title VII to allow a plaintiff to represent a class suffering from a common discriminatory complaint. While similarities of sex, race or national origin claims are not dispositive in favor of finding that the prerequisites of Rule 23 have been met, they are an extremely important factor in the determination, that can outweigh the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices. *See also Quigley* v. *Braniff Airways, Inc.*, 85 F.R.D. 74, 78-79 (N.D.Tex.1979); *Cooper* v. *University of Texas at Dallas*, 482 F.Supp. 187, 192 (N.D.Tex.1979). In addition here, the plaintiff showed more than an alliance based simply on the same type of discriminatory claim. He also showed a similarity of interests based on job location, job function and other considerations. *Cf. Crawford* v. *Western Electric Co., Inc.*, 614 F.2d 1300, 1304 (5th Cir. 1980).

Given our finding of a sufficient nexus between the plaintiffs' claims and those of the class, we find that the

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applicant for city employment, had been denied the right to represent a class of present and future city employees because she was not a member of the proposed class. The Supreme Court remanded the case for reconsideration in the light of two recent cases, *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) and *U.S. Parole Commission* v. *Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), which broadened the possible use of class actions when the named plaintiff's claim had become moot. Therefore, it seems that the Supreme Court's remand did nothing to question the rule in this Court that "across the board" actions can still be brought.

requirements of Rules 23 were satisfied.[8] *See* note 6. We therefore hold that the trial court acted correctly when it certified Falcon's claim on behalf of these other plaintiffs.[9]

C. *Appellee's Class Certification Claim*

On cross-appeal, the appellee contends that the trial court erred in refusing to extend the class to all Mexican-American employees who were employed by or had applied to any of General's divisions, not just the one at Irving. He contends that since he worked in all of the towns in the Fort Worth, Texas area, and not only in the Irving division, he can properly represent the larger unit.

We find that the district court acted within its discretion in limiting the class to the Irving location, especially

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[8] On the adequacy of representation issue, General also argues that there was no evidence to show the qualifications of the attorneys who represented the class. While it is true that the requirement of adequate representation includes the competence of the legal counsel of the representatives, *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), the competency of counsel can be judicially noticed, as was apparently done in this case. In any event, we do not overturn the trial court's decision on this matter, since it was not an abuse of discretion. *Guerine* v. *J&W Ins., Inc.*, 544 F.2d 863 (5th Cir. 1977); *Boggs* v. *Alto Trailer Sales, Inc.*, 511 F.2d 114 (5th Cir. 1975).

[9] For a similar analysis of *Rodriguez* and *Satterwhite*, *see Vuyanich* v. *Republic National Bank of Dallas*, 82 F.R.D. 420, 432-33 (N.D. Tex. 1979).

With our holding we do not intimate any conflict with the logic of *Crawford* v. *Western Electric Co., Inc.*, 614 F.2d 1300, 1304 (5th Cir. 1980) where the court said that "[t]he fact that plaintiffs are members of the same race as the other employees and rejected job applicants whom they seek to represent in a class action is not enough in itself to require a finding under Rule 23 that their representation was adequate or that their claims were typical of the class." Such a fact by itself, of course, is not enough to meet the requirements of Rule 23.

since the various General divisions each conduct their own hiring. In addition, management of such a large class would be much more difficult. *Cf. Hill* v. *American Airlines Inc.*, 479 F.2d 1057 (5th Cir. 1973).

II. *Jurisdiction to Hear the Claim*

The appellant argues here that the trial court did not have jurisdiction over the claim of hiring discrimination because the EEOC charge referred only to discrimination with respect to promotion. Relying on the opinions in *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) and *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978), General maintains that this Court's holding in *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), that a court could take jurisdiction of claims which are "reasonably" related to the EEOC charge, must be reexamined. The Company also argues that the EEOC investigation and determination concerning hiring were beyond its jurisdiction.

In *Sanchez*, this Court said:

> [T]he civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation. Within this statutory scheme, it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

431 F.2d at 466. Thus in *Sanchez*, this Court endorsed a liberal standard for requirements relating to the relationship between the charge, the investigation, and a civil suit.

The two cases cited by the appellant do not question this standard. In *United Airlines, Inc.* v. *Evans*, 431 U.S. 553,

97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), the Supreme Court held that a stewardess who had failed to complain of her discriminatory discharge was barred from later contending that she was discriminated against after being rehired based on the employer's failure to include her prior employment in determining her seniority. The court held that she was time-barred from complaining of the prior illegal discharge because she had not complained at the proper time. In *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978), this Court followed *Evans* by dismissing as time-barred a cause of action somewhat similar to the one in *Evans*. We find it difficult to see the relevance of these decisions to the issue here.

The question we face is whether an EEOC complaint of promotion discrimination is sufficiently related to a hiring discrimination claim to allow the EEOC to investigate both and therefore authorize a suit based on both charges. In *Gamble* v. *Birmingham So. Railroad Co.*, 514 F.2d 678 (5th Cir. 1975), this Court defined the "reasonable expectation" test of *Sanchez* again as hinging on whether the broader EEOC investigation might be expected to grow from the original complaint. *Id.* at 688.

Some courts have interpreted the standard of *Sanchez* to mean that any practice which is an outgrowth of the same basis of discrimination can be challenged in the court suit. *See Graniteville* v. *EEOC*, 438 F.2d 32, 41-42 (4th Cir. 1971) (discrimination in promotion related to discrimination in hiring); *McBride* v. *Delta Airlines*, 551 F.2d 113, 115 (6th Cir.), *vacated on other grounds* 434 U.S. 916, 98 S.Ct. 387, 54 L.Ed.2d 273 (1977) (individual firing charge requires review of any racially discriminatory practices because of large and complex corporate structure). *Cf. Arey* v. *Providence Hospital*, 55 F.R.D. 62, 67 (D.D.C. 1972) ("[i]t seems clear that once having received the complaint of discrimination against

complainant the EEOC would as a reasonable matter, extend their investigations to all areas of employment in which the complainant at one time or another had been exposed, including, of course, the facts and circumstances surrounding the initiation of her employment.") This Court in *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975) held that a charge of discrimination in termination will support another claim of discrimination in hiring. Other courts have held that the fact that EEOC ended up investigating a broader charge than the one alleged is a strong reason to allow the issue to be raised in a court suit. *Henderson* v. *First National Bank of Montgomery*, 344 F.Supp. 1373 (M.D. Ala. 1972); *Cf. Oubichon* v. *North American Rockwell Corporation*, 482 F.2d 569 (9th Cir. 1973); Note, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1216-18 (1971).

We find that the district court had jurisdiction over both the hiring and promotion claims under the *Sanchez* standard. This Court's traditional application of a liberal standard in this area is a reflection of our understanding about the realities of Title VII litigation. Often the complainants are poor and uneducated. They are unfamiliar with legal concepts and often do not comprehend the specific elements of their complaint. But they understand the basic premise of the Act. They feel that they have been discriminated against on the basis of race or some other impermissible factor. To hold these individuals to a high standard of knowledge about the bases of their charge would ill-serve the remedial purpose of Title VII. In this case, it is sufficient that Falcon alleged the type of discrimination ("national origin"), especially since an investigation of promotional practices almost inevitably leads to a study of hiring practices, and the EEOC did investigate both areas. *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d (5th Cir. 1975).

III. *Promotion Claims*

In this part of the appeal, General argues that Falcon never proved he was qualified for the promotion he sought. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). General also says that it articulated valid, nondiscriminatory reasons for not promoting Falcon, namely that those persons who were promoted were more qualified than Falcon, and that Falcon failed to prove that those reasons were merely pretexts for discrimination. *See Board of Trustees* v. *Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978).

In rebuttal, Falcon suggests that the Supreme Court's use of the word "articulate" in *Sweeney, supra*, was not intended to cover subjective criteria, but requires "something rationally based."

In "disparate treatment" cases, the plaintiff has the burden of establishing a prima facie case. That can be done by the plaintiff by showing

> (i) That he belongs to a [protected] minority [under the Act];
>
> (ii) That he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) That, despite his qualifications, he was rejected; and
>
> (iv) That, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Looking at these requirements, we find that clearly Falcon belonged to a protected minority under the Act;

that he applied for a job for which the employer was seeking applicants; that he was rejected, and that the employer hired others for the position. The only element of the prima facie case which the appellant attacks here is whether or not Falcon had the qualifications for the position he was seeking.

According to General, Falcon was recommended for promotion to a management position by two of his first level supervisors. At General, once a supervisor recommends an employee for a promotion to a management position, that employee is considered for all management positions for which he is considered qualified by reason of prior experience. General says that Falcon was "not considered *the most qualified* person for any of the openings." (Emphasis added.) That claim, however, even if true, does not mean that Falcon was not considered qualified. The fact that Falcon was recommended for promotion to management lends additional support to his contention that he was qualified for those positions. We therefore uphold the trial court's apparent finding that he was qualified and therefore find he made a valid prima facie case.

Falcon's having made that prima facie showing, General has the obligation to "articulate some legitimate, nondiscriminatory reason" for the action to dispel the adverse inference from the prima facie showing. *McDonnell Douglas* at 802, 93 S.Ct. at 1824. As stated in *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), the defendant must also prove that those hired or promoted were better qualified than the plaintiff. *See Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979), *cert. granted* —— U.S. ——, 100 S.Ct. 3009, 65 L.Ed.2d 1112 (1980).

In fact, General did put forth the explanation that the people hired for the positions Falcon wanted were

more qualified than he was.[10] Through statistical evidence, the Company also showed that Falcon had received three promotions in seven years of employment with General, an average of 0.43 promotions a year, while the average white worker at General received only .20 promotions per year. In addition, General said that Falcon received his first promotion only one month after being employed; the average white employee did not receive a promotion until he or she had been employed 14.91 months.

However, the trial court found that the ratings given Falcon and the others who had been promoted instead of him were "very similar" (all were favorable). Falcon, the trial court found, had no listed weaknesses except for "underground cable work." Since the trial court concluded that General had discriminated against Falcon, it must have reasoned that since Falcon had essentially the same overall ratings as those whites who were promoted, the Company's explanation that the others were "more qualified" was simply a pretext for discrimination and

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[10] The Company also attempted to prove at trial through the use of statistical evidence that Mexican-Americans, in general, were not adversely affected by General's promotion procedures. The trial court agreed with this second contention.

As to the specific openings about which Falcon complains, the Company says that one individual who was promoted to crew foreman had special training in electronics, went to college, and worked in the electronics field in the military. Another individual, promoted to inspector, had been a foreman with a contractor, and had performed essentially the same duties there, as he would in the job to which he was promoted. A third individual, promoted to crew foreman, the Company says, had held supervisory positions in the military.

The Company says that in the opinion of the second level supervisor, each of the men selected was more qualified than Falcon, who they say had no prior experience in either electronics or the communications industry and had performed unsatisfactorily in supervisory roles.

was not a legitimate reason for failing to promote him.[11] *Cf. Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 567, especially n. 8 (5th Cir. 1979), *cert. granted* —— U.S. ——, 100 S.Ct. 3009, 65 L.Ed.2d 1112 (1980).

Our task here then is to decide if the trial court was clearly erroneous when it concluded that Falcon was as qualified as the other people who were promoted. We conclude that the finding was not clearly erroneous.

As stated previously, General said that it felt Falcon was not the most qualified applicant for any of the openings. But there was credible evidence to the contrary. The EEOC investigator who looked into the case, Robert Ray, testified that he felt Falcon was not promoted because he was a Mexican-American. His notes made at that time, indicated that several people who worked with Falcon and with some of the others who were promoted, felt Falcon was at least as qualified as those promoted, and was not promoted because of his national origin. Ray also prepared a chart comparing, as objectively as possible, Falcon's qualifications and experience with that of the other people promoted.[12] What he found was that

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[11] The trial court also said that the criteria used to rate and to promote were subjective. The trial court reached this decision based on the company promotion procedure. According to the trial court:

"Hourly workers who wish a promotion bid for the job. When a vacancy occurs in a salaried management position, there is no formal posting procedure for hourly employees to be made aware of the vacancies. First line supervisors of hourly employees may make recommendations for promotions. These recommendations go to second line supervisors and the area personnel officer. . . ."

[12] Working with the entire employee file provided by General Telephone, Ray evaluated these employees' qualifications by looking at the date hired, previous experience, the last evaluation before they were promoted out of the lineman position, the date they were

Falcon was better qualified than one of the people promoted above him, as qualified as another, and less qualified than the third.[13] Similar findings by EEOC investigators in other cases have been described as "highly probative" by this Court. *Peters* v. *Jefferson Chemical Company*, 516 F.2d 447, 450 (5th Cir. 1975); *Smith* v. *Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972). Despite testimony from others that they considered Falcon less qualified than those hired, the trial court could certainly find that given the EEOC investigator's and Falcon's testimony, Falcon was as qualified as the other people promoted.[14]

We also note that this Court has stated previously that while qualifications are obviously an employer's prerogative, "the standards cannot be automatically applied to freeze out" minorities. *Rowe* v. *General Motors Corporation*, 457 F.2d 348, 358 (5th Cir. 1972). In *Rowe*, this Court recognized that "promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination. . . ." *Id.* at 359. While obviously not determinative in this case since a variety of other factors were considered in the promotion decision, we note that a principal element in that decision were the recommendations of Falcon's su-

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promoted from lineman in charge, the time between the last evaluation and the promotion, and the objective rating on their evaluation.

[13] Hoffman scored a 32, Hamrick a 31, and Raley a 28. Falcon scored a 31 also. *See* note 2.

[14] On General's behalf on this specific point, Jake Goldston, who was Falcon's second line superior, testified about several disciplinary actions taken against Falcon, and said he considered the others promoted to be more qualified than Falcon. Harvey Sumner, a construction foreman who supervised Falcon, testified that he once demoted Falcon because he was less efficient than other employees.

pervisors, all of whom were white. Given this Court's pronouncement in *Rowe*, the trial court could certainly look at the Company's explanations that Falcon was less qualified with some skepticism. *Cf. Fisher* v. *Proctor & Gamble Mfg. Co.*, 613 F.2d 527, 546 (5th Cir. 1980).

We therefore find that the trial court did not act incorrectly when it found that the Company's explanation that Falcon was less qualified than the others promoted was not legitimate or, as the court has put is, "pretextual."

IV. *Hiring Claims*

In this portion of the appeal, General argues that there was insufficient evidence to support the trial court's conclusions that General discriminated against the class members with respect to hiring. General questions both the factual sufficiency of the evidence, as well as the trial court's reliance on some statistics, as opposed to others.

In its Phase I order, the court focused on four statistical "facts:"

(1) 5.24% of the Dallas/Fort Worth labor force was Mexican-American;

(2) 1.22% of General's work force at Irving was Mexican-American in 1972;

(3) Twenty people were hired in 1972, but none of them was Mexican-American;

(4) Only 4% of those hired in 1973 were Mexican-American.

General claims that the district court improperly relied on the statistical disparity between the local labor force and the work force at the Irving facility, rather than relying on the plant hiring statistics for the years between 1972 and 1976. General contends that there is statistical evidence showing that:

(1) Mexican-Americans constituted 7.73% of the persons hired at the Irving facility from July 1972-July 1976, whereas only 5.24% of the local labor market was Spanish-American;

(2) From 1973 through 1976, 71 Mexican-Americans applied for jobs at the Irving facility and 13 were hired, an 18.3% percentage. During this time, only 5.66% of the Caucasian applicants were hired, although 81.5% of the local work force was Caucausian, as were 86.5% of the applicants.

See note 4.

Proof in this sort of class action case is usually dependent upon statistical comparisons. In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 936 (1977), the Supreme Court found that a prima facie case of discrimination could be found by showing great disparities in general population/work force statistics.[15] In *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the Supreme Court found that this same showing of disparity, along with instances of individual discrimination, established a prima facie case. However, there, the Court ruled that this prima facie showing could be rebutted with favorable evidence comparing the qualified labor market with the defendant's hiring policies during the relevant period.

This Court recently said in *United States* v. *City of Alexandria*, 614 F.2d 1358, 1364 (5th Cir. 1980):

> To make out a prima facie case of pattern or practice of discrimination in violation of Title VII,

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[15] In *Teamsters*, the plaintiff also presented many examples of individual discrimination.

> all that a private or government plaintiff need show initially is that there is a significant statistical disparity between the racial, sexual, or ethnic balance and composition of an employer's work force and that of the community from which the workers are hired. . . . This is true because, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters, supra,* 97 S.Ct. at 1856 n. 20.
>
> Once this prima facie case has been established, the employer may introduce evidence to attempt to rebut the inference raised by the figures. . . .
>
> (Citations omitted.)

We take this to mean that once the plaintiff has offered some evidence that is probative of disparity that may be statutorily significant, it is then the defendant's burden to come up with more specific statistical evidence to rebut the plaintiff's proof.

In this case, the trial court found that in 1972, the Irving Division hired 20 Caucasians, but no Mexican-Americans, and that in 1973, the total number of Caucasions hired at Irving was 155 or 76.7% and the number of Mexican-Americans hired was eight or 4%. However, the trial court made no findings about hiring in 1974 or 1975, even though both sides presented statistical evidence at least through the period of July 30, 1975.[16]

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[16] The statistical evidence proffered by the plaintiffs for hiring in the Irving Division showed:

Evidently, the trial court relied on the plaintiff's evidence for its hiring findings concerning 1972 and the defendant for its findings concerning 1973. *See* note 16.

Year	White	Black	Mexican-American
1972	19	1	0
1973	59	6	4
1974	26	6	6
1975	27	1	3
1976	8	0	0
	139	14	13
	(82.7%)	(8.31%)	(7.73%)

The evidence proffered by General, for hiring in the Irving Division showed:

Year	White	Black	Spanish Speaking	Other
1973	155	37	8	2
1974	53	6	9	0
1975 (thru 7/30)	4	9	3	0
	212	52	20	2
	(74.12%)	(15.18%)	(6.99%)	(.01%)

The plaintiff also introduced the following evidence comparing the percentage of Mexican-Americans with the total work force in that area:

Date	% Mexican-Americans
12/70	1.67%
12/71	1.29%
12/72	1.22%
12/73	1.82%
7/74	3.57%
1/75	4.52%
6/76	4.50%

According to the appellant's brief, the statistics in the exhibits presented by the plaintiff and those presented by the defendant vary because the information requested by the plaintiff to prepare his statistical analysis pertained to fewer than all of the Mexican-American applicants and jobs. That may account for some of the difficulty in interpreting this statistical information.

However, the trial court made no findings of fact concerning 1974 or 1975. It appears that the trial court must have found discrimination for those periods since the class action notice approved by the court was addressed to "all Mexican-Americans who applied for work at General Telephone Co. in Irving, Texas, in 1972, 1973, 1974, 1975, and through October 18, 1976." [17] This conclusion is bolstered by the fact that some members of the class who received relief applied for jobs in late 1975 or early 1976.

It would clearly be inappropriate for us to rule on the appellant's claim concerning the use of these hiring statistics, as opposed to applicant flow data, without knowing how or why the trial court relied on the statistical evidence it did and why it found hiring discrimination for the years 1974 and 1975. In *Hazelwood*, the Supreme Court indicated that the determination of what set of statistics are relevant can best be decided on a case-by-case basis. 433 U.S. at 311-312. *See Davis* v. *City of Dallas*, 483 F.Supp. 54, 60 (N.D. Tex. 1979). The evaluation of these statistics involves both a complex legal and factual inquiry. *See e.g., Cooper* v. *University of Texas at Dallas*, 482 F.Supp. 187 (N.D. Tex. 1979); *Davis* v. *City of Dallas*, 483 F.Supp. 54 (N.D. Tex. 1979); *EEOC* v. *Radiator Speciality Co.*, 610 F.2d 178 (4th Cir. 1979). We therefore remand this part of the case

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[17] The complete first part of the notice said:

ATTENTION: ALL MEXICAN-AMERICANS WHO APPLIED FOR WORK AT GENERAL TELEPHONE CO. IN IRVING, TEXAS IN 1972, 1973, 1974, 1975, and through October 18, 1976.

The following lawsuit is now pending in Judge Sarah T. Hughes' Court in Dallas and your rights may be affected. Judge Hughes has found that General Telephone Company of Irving, Texas, discriminated against Mexican-Americans as a class from 1972 to October 18, 1976 and you may be entitled to back wages or other relief under certain conditions.

to the district court for a more specific evaluation of both the plaintiff's and defendant's statistics with specific findings on the use of hiring data as opposed to applicant-flow data, including the reasons why the trial court concludes that the discrimination lasted past 1974.[18]

V. *Admission of General Services Administration (GSA) Reports*

In this portion of the appeal, we deal with appellant's objection to the admission of two letters from the GSA to the appellant, that were obtained from General through discovery. General complains that the letters were not authenticated, that there was no evidence as to the basis for the letters, and that the GSA is not authorized by law to determine whether an employer has violated Title VII.

The appellee claims the letters were admissible under Fed.R.Evid. 803(8) which provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .
>
> (8) Public records and reports. Records, reports, statements, or data compilations, in any form of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . . or (C) in civil actions and proceedings . . ., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of in-

[18] Such an evaluation of the statistical evidence, in the light of *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) and subsequent cases will be especially helpful because *Hazelwood* was decided after this part of the trial was completed.

formation or other circumstances indicate lack of trustworthiness.

As to the authenticity point, it is clear that the letters should have been authenticated under Fed.R.Evid. 901 and 902 which require authentication or identification as a condition precedent to admissibility, except in specific situations, none of which is present here. *See* Rule 902. However, the defendant did not object at trial that these documents were not authenticated, but objected only on the grounds that the letters were hearsay and not relevant. This Court has held for some time that "[e]xcept in unusual circumstances, the ground of objection to evidence must be specifically stated in order to preserve the point for appeal; . . ." *Carona* v. *Pioneer Life Insurance Company*, 357 F.2d 477, 480 (5th Cir. 1966); *Colonial Refrigerated Transportation, Inc.* v. *Mitchell*, 403 F.2d 541, 552 (5th Cir. 1968); *Morrow* v. *Greyhound Lines, Inc.*, 541 F.2d 713 (8th Cir. 1976); *see also* F.R.C.P. Rule 46; Rule 103(a)(1), Federal Rules of Evidence. Since General did not make this specific objection, it cannot raise the authentication issue on appeal.

Turning then to General's arguments concerning relevancy and hearsay, under Fed.R.Evid. 803(8) the letters are admissible if they are made pursuant to duties derived from authority granted by law. The letters were prepared by the General Services Administration, according to the appellant, as part of its contract compliance review.[19] While this authorization to investigate obvi-

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[19] Although it is not part of the record, we assume that this contract compliance review was part of GSA's former responsibility to monitor nondiscrimination in employment by government contractors and subcontractors. *See* Executive Order 11246, 30 F.R. 12319 (Sept. 24, 1965), as amended by Ex. Ord. No. 11375, 32 F.R. 14303 (Oct. 13, 1967); Ex. Ord. No. 11478, 34 F.R. 12985 (Aug. 8, 1969); Ex. Ord. No. 12086, 43 F.R. 46501 (Oct. 5, 1978). It is our understanding that subsequent to this action, this responsibility was transferred to the Department of Labor. *See* Executive

ously does not parallel the EEOC's authority under Title VII, the letters were admissible under Rule 803(8)(c) since the findings resulted from an investigation made pursuant to authority granted by law. It was certainly within the court's discretion to find that the letters were not untrustworthy. *See* Weinstein and Berger, Weinstein's Evidence § 803(8) [03] at 200-208 (1979).[20]

VI. *The Application Procedure and the Fnding that Openings Existed for Which the Class Members were Qualified*

In this portion of the appeal, the appellant urges that the trial judge improperly failed to require the class

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Order No. 12086, 43 F.R. 46501 (Oct. 5, 1978). *Cf. St. Regis Paper Co.* v. *Marshall*, 591 F.2d 612 (10th Cir.), *cert. denied*, 444 U.S. 828, 100 S.Ct. 55, 62 L.Ed.2d 36 (1979).

[20] In *Smith* v. *Universal Services, Inc.*, 454 F.2d 154, 157-58 (5th Cir. 1972), this Court ruled that an EEOC report in a Title VII case was admissible under the Federal Business Records Act, 28 U.S.C. § 1732, since it was prepared in the regular course of the Commission's business and in accordance with express statutory authority. That case was decided before the promulgation of the Federal Rules of Evidence. In *United States* v. *American Cynamid* [*Cyanamid*] *Co.*, 427 F.Supp. 859, 867 (S.D.N.Y. 1977), a case decided after the Rules took effect, that Court held that the business records exception of F.R. Evid. 803(6) which is very similar to 28 U.S.C. § 1732 (*see* Weinstein and Berger, Weinstein's Evidence § 803(6)[02] at 148-151) was not applicable to government records and reports. *But see United States* v. *Orozco*, 590 F.2d 789, 793 (9th Cir.), *cert. denied* 442 U.S. 920 [99 S.Ct. 2845, 61 L.Ed.2d 288] (1979) (Treasury Enforcement Communications System (TECS) cards admissible under § 803(8)). The court says "governmental functions could be included within the broad definition of 'business' in Rule 803(6)"). We do not address this question of the relationship between Rules 803(6) and 803(8) since we have already decided that these letters are admissible under Rule 803(8), but we certainly do not rule out the possibility that they might also be admissible under the "business records" exceptions as well.

members to bear the burden of proving that they were qualified for an available opening. As a second point, General argues that the trial court improperly found that General's employment policy exacerbated the discrimination.

As noted earlier, we have already decided to remand the issue of the class action hiring claims to the district court for further findings of fact. Without those further findings of fact, it is impossible for us to rule on these issues. Any questions surrounding the application procedures and policy will have to wait for answers until the trial court has indicated more clearly why it found discrimination and why it defined the class in the way it did.

VII. *Back-Pay Awards*

This issue concerns the sufficiency of evidence with respect to the specific back pay awards. Again, because of our previous decision to remand the hiring claims, we cannot review this part of the trial court's decision as to that portion of the class. However, we can review the claims as they pertain to Falcon, since we have upheld his request for relief.[21]

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[21] Specifically, General argued as to the whole class that there was:

(a) no proof of job availability;

(b) insufficient evidence to support the job security award of $300 because the class members would have been in a union if they had been hired;

(c) insufficient evidence to show what salaries these employees would have earned at General, and

(d) insufficient consideration of evidence indicating that certain employees either chose not to work or were not capable of working.

As to Falcon, the only consideration that would seem to be applicable would be (c).

The appellees also appeal from the trial court's decision on this issue. Again, we will only review those specific complaints that pertain to Falcon.[22]

The appellant claims that there was insufficient evidence to show what salaries the employees would have earned at General. *See* note 21. It is unclear how much of this claim is directed at the award to Falcon. In its Phase II opinion, the trial court calculated Falcon's earnings on the assumption that he would have been promoted to Field Inspector in 1972. *See* Part III.[23] We think there was clearly enough evidence of what Falcon would have earned to support the trial court's findings.

As to those contentions of the plaintiffs which are relevant only to Falcon, the trial court found that damages should be granted only up to the end of the "Phase I" trial, since it found that the defendant, by that date, had

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[22] The appellees argued that the trial court:

(a) undervalued the job security award;

(b) failed to award shift differential pay and increases based on promotion;

(c) failed to make awards for the period between the Phase I and Phase II trial. (The court had ordered specific injunctive relief in an attempt to end all discrimination at the end of Phase I);

(d) failed to award "front pay," or to retain jurisdiction in order to make periodically further back pay awards.

As to Falcon, the considerations that would seem to be applicable would be (c) and (d).

[23] The trial court took into account the fact that Falcon refused a promotion to Installer Repairman in 1970 and that in 1972, he voluntarily stepped down from lineman-in-charge to lineman. The trial court totalled his potential earnings from 10-8-72 to 10-20-76 as $47,336.72. It totalled his actual earnings if he had accepted a position as an installer repairman, when offered, as $46,296.49. It therefore awarded him damages of $1,040.33. Because of a mistake in calculations, Falcon actually should have been awarded a dime less.

remedied the discriminatory practices which gave rise to the litigation. As to Falcon, we do not find that decision to be clearly erroneous, intimating no judgment on the other class claims. In such matters, the trial court has broad discretion. *Cf. Fitzgerald* v. *Sirloin Stockade, Inc.*, 22 EPD ¶ 30,724 (10th Cir. 1980).

VIII. *Attorneys' Fees*

Since a portion of this suit is being remanded, we do not review the attorneys' fee claim at this time.

We therefore remand this case to the district court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART AND REMANDED IN PART.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

FINDINGS AND CONCLUSIONS

The above entitled and numbered cause was heard by the Court. The Plaintiff, Mariano S. Falcon and the Defendant, General Telephone Company of the Southwest with their attorneys were present. Evidence was presented and arguments heard. The Court after considering the evidence and exhibits, the pretrial briefs, the proposed Findings and Conclusions and other papers filed in connection therewith, finds and concludes as follows:

Findings of Fact as to Falcon

1. Plaintiff, a Mexican-American, was hired by Defendant on July 7, 1969, pursuant to a program devised to employ hard core unemployed minorities. Plaintiff finished only 6 grades of formal schooling and worked as a migrant worker before coming to Dallas. He trained himself and worked as a welder for several years before going with Defendant. Prior to his schooling with the Defendant, he was not trained in the communications area.

2. Defendant is a public utilities company and provides telephone service in a four state area, including the States of Texas, New Mexico, Oklahoma and Arkansas. The headquarters of the General Telephone Company of the Southwest is San Angelo, Texas. Plaintiff worked in the division office located in Irving, Dallas County, Texas. At the time that Plaintiff began to work for the Defendant, the Irving Division included Irving, Carrollton, Grapevine, Azle, Keller and Lewisville, Texas. Subsequenty, the Irving Division was restructured to include only Irving, Texas.

3. The Irving facility today employs approximately 526 employees, of which approximately 66 are management or salaried employees, the others being hourly paid employees. Of the 66 management or salaried employees only one is a Mexican-American.

4. There is no evidence that General Telephone discriminated against Falcon in hiring.

5. Upon completing his training course provided by the Defendant in construction fundamentals, the Plaintiff was employed by the Defendant in the position of Ground Worker. After approximately 30 days, the Plaintiff was promoted to Line Worker, and subsequently Line Worker-In-Charge by the end of his first year. He received no further promotion prior to the time his complaint was filed on October 17, 1972.

6. Plaintiff attended various schools while employed by the Defendant company including Construction Fundamentals and Buried Cables Placing before his complaint was filed. The Plaintiff successfully completed all of the courses.

7. All hourly employees, including Falcon, are advised at the time they are hired by General Telephone on the methods for getting transfers and promotions among hourly paid jobs. These methods are also contained in

General Telephone's contract with the Communications Workers of America, the union which represents its hourly paid employees. Hourly paid job openings are posted at numerous locations within the Irving facility. Employees are selected for such positions on the basis of seniority with the company and previous experience and training.

8. Hourly workers who wish a promotion to a higher hourly position bid for the job. When a vacancy occurs in a salaried management position, there is no formal posting procedure for hourly employees to be made aware of the vacancies. First Line supervisors of hourly employees may make recommendations for promotions. These recommendations go to Second Line supervisors and the area personnel officer. Falcon indicated his desire for promotion to management once before filing his charge and was recommended by his supervisor. Hourly workers are rated from time to time by their supervisors. All supervisors who rated these employees and recommended them for promotion as well as the Second Line supervisors and area personnel officer who selected employees for management were Caucasians. The criteria used to rate and to promote are subjective and are not based on objective criteria.

9. On October 17, 1972, Falcon, on behalf of himself and a class of Mexican-Americans, filed a charge with the Equal Employment Opportunity Commission against General Telephone alleging discrimination in hiring and promotion because of national origin.

10. Prior to October 16, 1972, Falcon had received two promotions. At that time he was a Lineman in Charge; Jerry Hoffman, hired January 20, 1970, was Construction Foreman, having received 4 promotions; Randall Raley, hired July 27, 1970, was a Cable Splicer with 3 promotions; Jerry Eden, hired January 24, 1972, as Line Worker, was then Crew Foreman after 3 promotions;

William Hamrick, hired August 19, 1969, as Line Worker, was Construction Foreman after 2 promotions. Plaintiff had more seniority than any of these at the time they were promoted over him.

11. Raley had had 2 years previous experience as a telephone Installer Lineman, Jerry Eden five and a half years experience with Outside Plant, and William Hamrick 3 years as Line Foreman and Splicer. Ratings given Falcon, Hoffman, Raley, Eden and Hamrick during their service with the Company were very similar. All were favorable. There were some with weaknesses such as "frequently impresses people unfavorable, needs to make better use of time", some with strengths such as "above average work, impresses people favorably." Falcon had no listed weaknesses except "underground cable work." Everything else was favorable.

12. The EEOC made a finding and determination on January 29, 1974, which held that the timeliness and all other requirements of Title VII had been met by Falcon and that General Telephone was an employer under the definition of the Act.

13. Falcon received a Notice of Right to Sue letter dated January 21, 1975, and initiated this action in the United States District Court for the Northern District of Texas on April 3, 1975.

Conclusions of Law as to Falcon

1. The Court has jurisdiction of this cause of action under 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981.

2. General Telephone did not discriminate against Falcon in connection with his hiring.

3. General Telephone did discriminate against Falcon in its promotion practices.

4. Falcon is entitled to recover compensation for being discriminated against by General Telephone in its promotion practices.

5. Falcon is entitled to recover attorneys fees for his attorney.

Findings of Facts as to Class

1. Plaintiff, Mariano S. Falcon, is a Mexican-American who works for Defendant General Telephone in Irving, Dallas County, Texas. Falcon was hired by Defendant on July 7, 1969, under the program known as Operation Attainment, and subsequently commenced to work as a Ground Worker, which is in the lowest pay group in Defendant's Irving facility. Plaintiff was employed in the Irving Division. Falcon presently holds the position of Cable Splicer, which is in the highest pay group of hourly paid positions in General Telephone's Irving Division.

2. Defendant is a public utility corporation, a wholly owned subsidiary of General Telephone and Electronics, and provides telephone service in the States of Texas, New Mexico, Oklahoma and Arkansas. Defendant's headquarters is in San Angelo, Texas. It has various area and division offices which serve the above referenced states. In 1969, when Falcon commenced to work for General Telephone in the Irving Division, the Irving Division consisted of Defendant's facilities in the cities of Irving, Keller, Grapevine, Lewisville, Carrollton and Azle, Texas. In 1971, the Irving Division was divided and presently consists of facilities located in Irving, Dallas County, Texas. It employs approximately 526 employees, of whom approximately 66 are management or salaried employees and the others are hourly paid employees. There is only one Mexican-American in management or salaried positions in the Irving facility.

3. Plaintiff instituted this action on April 3, 1975, individually and as a representative of the class pursuant

to Rule 23 (b) (2) of the Federal Rules of Civil Procedure. Thereafter the Court ordered the case to proceed as a class action and the Plaintiff represent the class composed of Mexican-Americans now employed and those who have applied for employment.

4. The percentage of Mexican-Americans in the Dallas-Fort Worth labor force is 5.24% and of Caucasians in 81.5%. Px 21.

5. The percentage of Mexican-Americans employed at the Irving facility in 1972 was 1.22%. Px 16.

6. In 1972, the total number of Caucasians hired at the Irving facility was 20. No Mexican-Americans were hired. Px 17.

7. In 1973, the total number of Caucasians hired at the Irving facility was 155 or 76.7%, the number of Mexican-Americans was 8 or 4%. Dx 8.

8. All hourly employees, including Plaintiff, are advised at the time they are hired by Defendant on the methods for getting transfers and promotions. These methods are also contained in Defendant's contract with the Communications Workers of America, the union which represents Defendant's hourly paid employees, including Plaintiff. Hourly paid job openings are posted at numerous locations within the Irving facility whereby employees are advised of job openings and may indicate their interest in each such opening by signing the posting. Employees are selected for such positions on the basis of seniority with the company and previous experience and training.

9. The average time before a Caucasian received his first promotion at the Irving facility is 14.91 months. The average time before a Mexican-American received his first promotion is 8.28 months.

10. The promotion rate for Caucasians at the Irving facility is 0.20 promotions per year or one promotion every 5 years. The promotion rate for Mexican-Americans is 0.23 promotions per year or one promotion every 4.35 years. Dx 6.

11. General Telephone has an affirmative action plan whereby it has committed to employ all persons in all jobs without consideration to race, color, creed, religion or sex. Each of Defendant's facilities has such a plan, including the facility in Irving, Texas. Defendant has had such a plan since 1972. Prior to that time, Defendant had affirmative action policies, but no formal plan. The affirmative action plan for each of Defendant's divisions is distributed to the Division Manager and his immediate staff.

12. General Telephone's affirmative action program needs upgrading in respect to recruiting, training, staff meetings and promotions.

Conclusions of Law as to Class

1. Plaintiff, Falcon, fairly and adequately represents Mexican-Americans now employed and those who have applied for employment at the Irving facility of General Telephone.

2. General Telephone discriminated against Mexican-Americans at its Irving facility in its hiring practices.

3. General Telephone has not discriminated against Mexican-Americans at its Irving facility in its promotion practices.

4. The members of the class of Mexican-Americans who applied for work at the Irving facility and were not hired are entitled to be compensated, to be determined at a later hearing.

5. Falcon and the class he represents are entitled to reasonable attorney's fees to be determined at a later hearing.

6. In order to accelerate its affirmative action plan, General Telephone is ordered to taken the folowing steps to more actively recruit and promote Mexican-American at its Irving facility:

(a) General Telephone will recruit Mexican-American employees through the use of Spanish language newspapers and through the use of employment agencies that specialize in the placement of Mexican-Americans, as well as other minorities. It will recruit at schools with a high Mexican-American enrollment. General Telephone will encourage in writing all Mexican-American employees in the Irving cacility to recruit their friends for employment with General Telephone.

(b) In order to make more Mexican-Americans available for openings in management jobs, each Mexican-American employee, on his or her own initiative, may submit name and qualifications to his or her immediate supervisor for consideration for any managment job which the employees specifies. The immediate supervisor must review the qualifications of each such employee and submit the names, qualifications and jobs requested to the area personnel office. An area personnel officer must respond to each such employee within a reasonable time and advise him or her of any weaknes in his or her qualifications that might hamper his or her being promoted into a requested management job. If there are no such weaknesses in an employee's qualifications, he or she will be considered for each opening thereafter occurring in each position that the employee listed for which he or she is qualified. Each time a qualified

Mexican-American employee is not selected for an opening, the area personnel office must so notify the employee and explain why he or she was not selected. If an employee's qualifications are weak, an area personnel officer will advise each such employee of his or her weakness or weaknesses and of suggested training that should improve those weak areas. After each such employee has improved those areas in which he or she was weak, the employee may then resubmit his or her name, qualifications and jobs requested to the area personnel office.

(c) General Telephone will encourage and sponsor training for higher level jobs for Mexican-Americans by providing college tuition aid and correspondence course aid for Mexican-American employees who apply for such aid. The aid provided will be a refund of 75% for all tuition, registration fees and required books for all courses completed with a grade of C, satisfactory, or an equivalent score, and a refund of 100% for all tuition, registration fees and required books for all courses completed with a grade of A or B, or an equivalent, all such aid being subject to withholding tax. The maximum aid available for any one calendar year is $500 and is based on the following terms:

(1) The employee must be a full time employee who has been employed by General Telephone for at least six months.

(2) The school or course must be accredited by the appropriate association or council, or approved by General Telephone.

(3) The employee must have a current performance rating of good, very good or excellent.

(4) The desired course of study must be on a subject which is a direct technical skill or knowledge requisite of the employee's present job or a job to which he or she aspires and has a reasonable chance of attaining.

(5) School attendance must be on an employee's own time; however, for a course essential to an employee's development which is available only during working hours, a special work assignment schedule may be made if the requirements of the job permit. In such cases, hourly paid employees will be paid only for the hours worked, and salaried employees will be expected to work the normal number of hours in the pay period.

(6) Only courses which are started and completed while the applicant is employed by General Telephone will be subject to eligibility for tuition aid.

(7) All courses and schools must be approved prior to enrollment to warrant tuition aid.

(8) Any time an employee is turned down for tuition aid, or a course or school is not approved, a written explanation from an area personnel officer must be transmitted to such employee.

(d) In addition to the tuition aid program and in addition to the training already provided by General Telephone, Defendant will provide certain home study courses for Mexican-American employees to be completed on the employee's own time. All such courses must be on a subject which is a direct technical skill or knowledge requisite of the employee's present job or a job to which he or she aspires and has a reasonable chance of attaining.

(e) The manager of the Irving facility will hold monthly staff meetings, which shall be attended by all staff members working in the Irving facility, regardless of their reporting lines, at which time min ity awareness and affirmative action will be one of the topics discussed. All staff members in the Irving facility, regardless of their reporting lines, will have quarterly meetings with their second level management employees at which time minority awareness and affirmative action will be one of the topics discussed. All second level management employees working in the Irving facility, regardless of their reporting lines, will have quarterly meetings with their first level management employees at which time minority awareness and affirmative action will be one of the topics discussed. At all of these meetings the goals for the employment of Mexican-Americans at all job levels and the statistics concerning the attainment of those goals will be reviewed.

(f) The manager of the Irving facility will insure that all management level employees working in the Irving facility are informed of the fact that their future advancement with General Telephone will depend in part on their attainment of their affirmative action goals and their treatment of Mexican-American employees.

(g) General Telephone will make a good faith effort to fill its openings in management level positions in its Irving facility with qualified Mexican-Americans until at least 5.24% of its management employee in the Irving facility are Mexican-Americans; and Defendant will make a good faith effort to maintain a minimum of 5.24% Mexican-Americans in management positions in the Irving facility at all times.

(h) General Telephone will advise in writing all Mexican-American employees in its Irving facility of the terms of paragraphs (b), (c) and (d) of this order.

(i) The Court shall be provided with copies of the notices required by paragraphs (a) and (h) of this order. The Court shall also be provided with all copies of General Telephone's EEO-1 reports which cover employees who work in the Irving facility.

(j) This order shall remain in effect until the percent of Mexican-Americans employed by General Telephone in its Irving facility is at least 5.24% and the percent of Mexican Americans employed in management level jobs at Defendant's Irving facility is at least 5.24% and until both such levels have been maintained for a continuous six months' period, at which time this order will automatically expire. The Court and Plaintiff's attorney must be provided with an affidavit from Defendant that the percentage levels for the required period of time have been achieved.

7. Any finding of fact deemed a conclusion of law is so adopted. Any conclusion of law deemed a finding of fact is so adopted.

Signed this 22nd day of March, 1977.

/s/ Sarah T. Hughes
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

JUDGMENT

On this the 22nd day of March, 1977, the Court enters judgment in the above entitled and numbered cause based on its Findings and Conclusions this day filed.

It is ORDERED, ADJUDGED and DECREED

1. Defendant, General Telephone Company of the Southwest is ordered to pay Mariano S. Falcon compensation for discrimination as may hereafter be found by this Court.

2. Defendant, General Telephone Company of the Southwest is ordered to pay the class, represented by Mariano S. Falcon, compensation for discrimination, as may hereafter be found by this Court.

3. Defendant, General Telephone Company of the Southwest is ordered to pay the attorney for Falcon and the class he represents, an attorney's fee as may hereafter be determined by this Court.

4. Defendant, General Telephone Company of the Southwest, is directed within thirty (30) days to prepare and file an amended affirmative action program containing the elements contained in the Court's Conclusions of Law pertaining to the class.

Costs against Defendant.

/s/ Sarah T. Hughes
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-75-0403-B

MARIANO S. FALCON

vs.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

PRE-TRIAL ORDER

The Court, at a Pre-Trial conference held on October 10, 1975, entered the following Pre-Trial Orders:

I.

The case is to proceed as a class action and the Plaintiff is to represent the class. The class is to be made up of those employees who are employed and employees who have applied for employment in the Irving Division of the Defendant company, and no other division.

II.

Defendant is to deliver to Plaintiff's counsel the affirmative action plans that Defendant company has in effect, or has had in effect.

III.

Plaintiff and Defendant are to hold further negotiations to see if there is a possibility of granting individual relief to the Plaintiff, MARIANO S. FALCON.

IV.

The case is set for trial on March 15, 1976, at 9:30 o'clock A.M.

ENTERED on the 2nd day of February, 1976.

/s/ Sarah T. Hughes
Judge

Page Solo. PRE-TRIAL ORDER

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON

vs.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

ORDER

On this day came before the Court for consideration the Motion to Compel filed by the Plaintiff and the Motion to Reconsider Certification of a Class filed by the Defendant in the above styled and numbered cause.

Upon consideration of those Motions, the briefs and arguments of counsel, and a review of the pleadings in this cause, the Court is of the opinion that the Motion to Compel should be granted and the Motion to Reconsider should be denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant shall supply the Answers to Plaintiff's Interrogatories as far back as Defendant's records go, and for the dates on which the Defendant has records;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Motion to Reconsider is DENIED,

and this action shall proceed as a class action; however, Defendant may at any time raise the issue of this provisionally-certified class during or after the presentation of the class claims and evidence at trial;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this cause shall be reset for April 19, 1976 for trial.

SIGNED AND ENTERED this eleventh day of March, 1976;

/s/ Sarah T. Hughes

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON,
Plaintiff

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Defendant

ORDER

On this the 31st day of October, 1978, came before the Court Defendant's First Amended Motion to Alter or Amend the Final Judgment or in the Alternative Motion for New Trial and the Court finds that such motion should be DENIED.

It is therefore ORDERED, ADJUDGED AND DECREED that Defendant's First Amended Motion to Alter or Amend the Final Judgment or in the Alternative Motion for New Trial in the above styled and numbered cause be and the same is hereby DENIED.

Signed this the 31st day of October, 1978.

/s/ Sarah T. Hughes
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
N. D. TEXAS
DALLAS DIVISION

No. CA 3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY

Oct. 20, 1978

ORDER

HUGHES, District Judge.

The plaintiff, Mariano S. Falcon, a Mexican-American, was hired by General Telephone on July 7, 1969. He brought this suit against General Telephone for himself and Mexican-Americans similarly situated on April 3, 1975, alleging discrimination in hiring and promotion.

Judgment was rendered on March 22, 1977, the Court finding that Falcon was not discriminated against in hiring, but in promotions the General Telephone discriminated. As to the class, however, General Telephone discriminated in hiring but not as to promotion.

In fashioning the relief in the instant case, the Court has, insofar as possible, made each plaintiff whole for the damage which each named plaintiff suffered. The relief

granted includes awards for backpay, overtime pay, where evidence of overtime work performed was presented, loss of job security, and six (6) percent interest compounded annually from the end of "phase I" of the trial to date of this judgment.

The Plaintiff prays and the Court denies monetary relief for shift differential pay, potential promotions, and "individual initiative" on the grounds that such an award would be too speculative. Although the Court is cognizant of the difficulty in ascertaining to an exactitude, damages in back pay awards, the Court has fashioned the relief in a manner which avoids the "quagmire of hypothetical judgments" noted in *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).

The Court further finds that damages should be granted up to the end of "phase I" of the trial. This determination is grounded upon the finding that the Defendant, by this date, had remedied the discriminatory practices which gave rise to the instant litigation. Such a cut-off date, the Court finds, is in keeping with the principles enunciated in *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977). Although in *James, supra*, the Fifth Circuit examined the applicability of "front pay" awards in Title VII cases, the Court here finds that damages, calculated to the end of "phase I" of the trial, plus interest, is analogous to placing the discriminatee in his "rightful place."

In a Title VII trial it is the complainant who must carry the initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973). This burden has been met by each named plaintiff. The burden then shifts to the prospective employer to persuade the Court that the failure to hire the individual was based upon non-discriminatory grounds. *Id.*

The Court finds from the evidence presented that the defendant's method of accepting and acting upon applications for employment while not in itself discriminatory, exacerbated the extant discriminatory practices of the Defendant.

Unrebutted evidence was presented that applicants seeking employment were never told what jobs were available at the time of their application. This practice led many of the plaintiffs to apply for "anything" rather than select a possible second position. Similarly, absent information of available positions, the applicants had no idea what skills the defendant deemed essential for employment. Although the defendant had a policy of keeping applications "active" for a 90 day period, this information was never communicated to these minority applicants at the time they tendered their applications. Thus, applicants who believed they would be considered for a job whenever an opening developed, learned at trial that the defendant had placed their application in an inactive file 90 days after its submission.

Because the defendant failed to give plaintiffs notice of the types of jobs available, failed to communicate to these applicants what qualifications were necessary, and failed to inform any plaintiff that his application would be "retired" after 90 days, the Court finds that under the facts of this case it is the defendant and not the plaintiff who must carry the burden of proof on the issue of job availability.

The Court further finds from the evidence that the defendant, when it offered any proof, offered proof of job availability only for the 90 day period subsequent to the applicant's tendering of his application.

The Court finds that the information described above was peculiarly within the knowledge of the defendant and though requested by plaintiff's counsel was never provided the opposing party. Thus, as Mr. Justice Powell

noted in *McDonnell Douglas, supra,* the "prima facie proof required . . . is not necessarily applicable . . . to differing factual situations." *Id.* at 802 n.13, 93 S.Ct. at 1824. The Court finds the instant case to be one such "differing factual situation" warranting a shifting of the burden of proof on the issue of job availability. Thus, when the defendant has failed to bring forth evidence of job nonavailability after the 90 day period, the Court has awarded damages as if a job was available on the 91st day.

Findings of Fact

CASTILLO, JOSE R.

Mr. Castillo, thirty-four years old, applied for a Field Inspector's position at General Telephone on July 16, 1973. The Court finds, by the evidence presented, that no field inspector's position was available during the three months in which Mr. Castillo's application was "active." Because there is no evidence that a Field Inspector's position was not available after this three month period, the Court has determined that back wages should be granted from the first day after the three month period to the end of "phase I" of the trial. Actual Earnings have also been calculated on the basis of these dates. Plaintiff's rate of pay is based upon information supplied by both Plaintiff and Defendant. Where the parties disagreed, the Court has averaged their data to arrive at a satisfactory rate of pay.

CERDA, MARIA

Mrs. Cerda applied for a clerk's position or any position at General Telephone on August 11, 1974. Although, by the evidence presented, General Telephone hired three clerks during the three month period in which Mrs. Cerda's application was "active", the Court finds that the people hired were more qualified for the clerk's position than Mrs. Cerda who was unable to type and would

begin typing lessons in September, 1974. Because there is no evidence that a clerk's position or any other position was not available after Mrs. Cerda's "active" period, the Court has determined that back wages should be granted from the first day after the three month period to the end of "Phase I" of the trial. Plaintiff's rate of pay was based upon data presented in General Telephone's collective bargaining agreement dated June 16, 1974, Appendix B-4. This is the pay structure for an entry level clerk in the Irving facility.

ESQUIVEL, PEDRO JUAN

Mr. Esquivel applied for an electronic technician's position or any position at General Telephone on October 6, 1975. The defendant put forth evidence that during the "active" period of Mr. Esquivel's application one frameman's position became available. This position was filed by Milton Johnson, an ex-employee of General Telephone's Irving facility. The Court finds that Mr. Johnson was better qualified than Mr. Esquivel for the position of frameman. There is little or no evidence however, that a position was or was not available after the application of Mr. Esquivel was no longer "active", *see* defense exhibit 53, and therefore the Court has granted damages from the first day after the three month period until the end of "phase I" of the trial. The parties have disagreed on the proper rate of pay for Mr. Esquivel. Defendant relies on data presented in Appendix E-3 of the 1974 Collective Bargaining Agreement reserved for Frameworkers and Helpers (entry level position). *See Appendix* E-18. Plaintiff has classified Mr. Esquivel in the highest "Service & Engineering-Construction Workers" category. *See* Appendix E. The Court has resolved this controversy by placing Ms. Esquivel in Group III, one step above entry level for his entire operative period. See Appendix E-2.

FLORES, ARMILDA

Ms. Armilda Flores, age twenty-three, applied for a general clerk's position or a position at the "repairment" (sic) department of General Telephone on June 26, 1974. Evidence was presented that the defendant hired a number of people during the "active" period of Ms. Flores application. *See* defense exhibit 19. All applicants, the Court finds, were better qualified than Ms. Flores except one. As for applicant Barbara Toliver, *See* defense exhibit 19 (third applicant at pp. 1-2) the defense presented oral testimony that Toliver had "shown a desire to learn." The Court finds this evidence insufficient to deny Ms. Flores a position. The Court also finds defendant's characterization of Ms. Toliver equally applicable to Ms. Flores. The Court has therefore calculated Plaintiff's damages from the date of application through the end of "phase I" of the trial. Defendant also argues that plaintiff has overstated Ms. Flores potential earnings at the Irving facility by opting for a rate of pay higher than she deserves. The Court has placed Ms. Flores in Appendix B-4, the entry level for clerks at the Irving facility.

GARCIA, FLORIA

Ms. Garcia applied for either an operator's or clerk typist's position at General Telephone on October 15, 1974. At the time of her application, Ms. Garcia could type fifty words per minute. Although defendant put forth evidence that no full-time positions were available from October 1974 to May 1975, plaintiff countered by showing that some individuals were hired, including certain part-time positions. The Court has therefore calculated plaintiff's damages from three months after her date of application through "phase I" of the trial. Evidence was presented, however, that Ms. Garcia worked only part-time for some four years after her application to defendant. This decision was her own choice. The

Court has therefore granted plaintiff only part-time employee's wages for the entire operative period. Part-time wages are calculated on the basis of twenty hours per week. This determination appears to parallel Ms. Garcia's actual work record during this same period.

GARZA, DIANA

Ms. Garza applied for an office clerk's position, a teller's position or a service representative's position at General Telephone on August 14, 1974. One person was hired during the active period of plaintiff's application. There is no evidence whether this person was better qualified than Ms. Garza but by her application it is clear that Ms. Garza had no typing or shorthand skills at the time of her application. The Court has computed Ms. Garza's damages from three months after her date of application through "phase I" of the trial and has classified Ms. Garza as an entry level clerk. *See* Appendix B-4.

GUZMAN, ANICETO DIAZ

Mr. Guzman applied for a Lineman's position or "whatever was available" at General Telephone's Irving facility on September 16, 1974. He stated in his application that he was not available until December of that year. The Court has therefore calculated Mr. Guzman's damages from December 1, 1974 through "phase I" of the trial. The parties have disagreed on the proper rate of pay for Mr. Guzman had he been employed at defendant's Irving facility. The Court finds that a "Lineworker's position". *See* Appendix E-2, is the appropriate classification and damages have been calculated accordingly.

LONGORIA, JUAN J.

Mr. Longoria applied for a Lineman's position with General Telephone on April 30, 1973. Although there is no testimony whether a Lineman's position became avail-

able, the Court has determined under existing precedent that the earliest date for which backpay can lawfully be awarded is August 23, 1973. Thus, the Court has computed Mr. Longoria's damages from August 23, 1973, through the end of "phase I" of the trial. Further, the Court has classified Mr. Longoria as a Lineman in Group III. *See* Appendix E-18.

LOPEZ, ROBERT ALFRED

Mr. Lopez applied to General Telephone on July 24, 1974, for a Phone Installer's position or "any position." In his application, Mr. Lopez expressed his willingness to work nights, Saturdays, Sundays, and Holidays. Evidence was presented that no Installer's position opened during the pendency of Mr. Lopez' application. The Court has therefore calculated Mr. Lopez' damages from three months after his application through "phase I" of the trial.

Although Plaintiff classified Mr. Lopez as a Group II employee throughout this period, *See* Plaintiff's Exhibit 9, the Court finds that Mr. Lopez is more properly classified as a Group IV employee (entry level status) during the first six months of his employment and then as a Group I employee thereafter so as to account for the necessary training required of new employees. Further, an additional adjustment has been made to Mr. Lopez' actual earnings to account for the use of an apartment during twelve months of the operative period. On the basis of testimony presented, the Court has valued the use of the apartment at $125.00 per month. No adjustment has been made for Mr. Lopez' use of an automobile on the grounds that such use does not amount to income and was provided by the employer for the employer's business purposes.

LYSHOL, MARTHA

Ms. Lyshol applied for a cashier's position, a clerk's position, an operator's position or "any position" at

General Telephone on October 8, 1975. Defendant put forth evidence that plaintiff was not hired because she did not possess the skills necessary to operate a "ten-key" adding machine. This was so, the defendant argues, even though Ms. Lyshol was able to type thirty-five words per minute. Further, the defendant states that Ms. Lyshol refused to work on Sundays therefore making her ineligible for certain other positions for which she was qualified. On Ms. Lyshol's application it is clear that she was available on nights, Saturdays and holidays.

The Court finds the defendant's grounds for denying Ms. Lyshol employment to be illusory and has therefore calculated her damages from the day after her application. Further, the Court has classified Ms. Lyshol as an entry level clerk under the 1974 Collective Bargaining Agreement governing pay scales at General Telephone's Irving facility. *See* Appendix B-4.

MARES, STEVEN

Mr. Mares applied at General Telephone on July 23, 1976, for an Installer Repairmen's position or a Frameman's position. Plaintiff testified, and the Court finds credible, that plaintiff, like all other plaintiffs here, was never told of an "active" period nor that the defendant "retired" an application after 90 days. Further, the defendant put forth no evidence regarding the availability (or nonavailability) of the position during the pendency of Mr. Mares' application. The Court has therefore calculated damages for Mr. Mares beginning one day after his application and extending through the end of "phase I" of the trial. The Court has classified Mr. Mares as an Installer Repair Person (Group II; Appendix E-1) based upon his prior experience with Mountain Bell as an Installer Repair Person. Further, because Mr. Mares held two jobs during the period of 7-24-76 to 8-6-76, the Court has awarded Mr. Mares overtime wages equaling eighty hours during that same period. This, the Court

finds, is the only equitable manner of resolving Mr. Mares potential earnings, vis-a-vis his actual earnings for the same period. It must be noted, however, that no overtime wages beyond the above period have been granted by the Court for Mr. Mares.

ORTIZ, HERMALINDA

Ms. Ortiz applied to General Telephone on March 19, 1974, for a Clerical Trainee's position. Defendant, through testimony by Edda Bates, presented evidence that eleven positions existed while plaintiff Ortiz' application was active. Defendant further elicited testimony that the necessary qualifications for these positions varied but the plaintiff must have been able to; work nights, operate a "ten-key" adding machine, or have a sales or a clerical background. The Court finds the defendant's grounds for denying Ms. Ortez employment to be without foundation. The skills necessary to operate a "ten-key" adding machine were certainly within Ms. Ortez' capabilities and the training period would not have been so onerous as to preclude the defendant from hiring her. The Court has therefore calculated Ms. Ortiz' damages from the day after her application through the end of "phase I" of the trial. The Court has classified Ms. Ortiz as an entry level clerk. *See* Appendix B-4.

SANCHEZ, RAMON S.

Mr. Sanchez applied to General Telephone on June 21, 1974, as a maintenance or labor trainee. Defendant presented evidence that no jobs, of the type Mr. Sanchez applied for, were available during the pendency of Mr. Sanchez' application. The Court has therefore calculated damages from the first day after Mr. Sanchez' application was no longer active. The Court further finds that, notwithstanding the testimony, Mr. Sanchez was never a full-time student and has therefore calculated damages

for the entire period. The testimony regarding Mr. Sanchez' studies included a statement that he was a full-time student at Tarrant County Junior College, a full-time student at University of Texas at Arlington, and a full-time employee as a porter at the Dallas-Fort Worth Airport. His status as a student and employee supposedly occurred at the same time. Due to Mr. Sanchez' condition (Parkinson's disease) the Court has made every effort to reconstruct this period in his life from testimony, interrogatories presented to the Court and his work record. Because Mr. Sanchez received unemployment compensation during eleven months of the operative period, the Court considers such compensation to be in lieu of compensation he would have earned had he been employed. Therefore, Mr. Sanchez' unemployment compensation has been included in his actual earnings. The Court has not altered Mr. Sanchez' income because of his debilitating disease. The Court reaches this conclusion on the grounds that Mr. Sanchez continued in gainful employment through the operative period determined by this Court.

FALCON, MARIANO S.

Mr. Falcon was hired by General Telephone on July 7, 1969, pursuant to a program devised to employ unemployed minorities. The Court has previously found that there was no evidence of discrimination against Falcon in hiring. Falcon was employed by General Telephone as a Ground Worker, after 30 days he was promoted to Line Worker and subsequently to Line-Worker-In-Charge by the end of his first year. He received no further promotion prior to the time he sought a promotion to Field Inspector on October 8, 1972. The Court finds that at that time he was discriminated against, 4 other men, not Mexican-Americans, with less seniority than Falcon, had been promoted over him. His potential earnings have therefore been calculated on the basis of the position Field Inspector.

Mr. Falcon voluntarily refused a promotion to Installer Repairman at General Telephone in 1970, and in 1972 he voluntarily stepped down from Lineman-In-Charge to Lineman. Because of Mr. Falcon's refusal to accept a promotion and in stepping down, these actions have been considered in the determination of his actual wages. Since he was employed by General Telephone during the entire time for which damages have been awarded, the additional amount has not been included for job security, interest, however, has been included.

Attorneys' Fees

In "phase I" of this trial, it was determined that plaintiff, Mariano S. Falcon for himself and the class he represents, was entitled to recover attorney fees. The attorneys working on the case were Frank Hernandez, John Collins, and law clerk George Solares. A paralegal clerk Lynn Drake also worked on the case.

A reasonable fee for attorneys is $80.00 an hour. Frank Hernandez spent 182 hours in preparation, making his fee $14,560.00. John Collins spent a total of 112 hours in preparation, making his fee $8,960.00. A reasonable fee for a law clerk is $25.00 an hour. George Solares spent 89.5 hours in preparation as a law clerk making a total fee of $2217.50. A reasonable fee for a Junior Attorney is $60.00 an hour. George Solares, after he was admitted to the bar, spent 36.5 hours, making a total fee of $2190.00. A reasonable fee for a paralegal clerk is $20.00 an hour. Lynn Drake, a paralegal working for John Collins spent 45 hours in paralegal work, making a total fee of $900.00. Mariano S. Falcon for himself and for the class he represents is entitled to recover a total of $28,827.50 for legal services.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action 3-75-0403-B

MARIANO S. FALCON

v.

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

FINAL JUDGMENT

After full and impartial consideration of the above entitled and numbered cause, the Court, based on the Findings of Fact and Conclusions of Law rendered on March 22, 1977, and the Findings of Fact and Conclusions of Law contained in this Court's Order dated October 20th, 1978, renders final judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

That final judgment of this action be entered in favor of Mariano S. Falcon and the class which he represents against General Telephone Company of the Southwest in the amount of $67,925.49 together with interest accruing hereafter from the date of final judgment.

Dated this 20 day of October, 1978.

/s/ Sara T. Hughes
United States District Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3587

D.C. Docket No. CA 3-75-0403-B

MARIANO S. FALCON,
Plaintiff-Appellee
Cross-Appellant,

versus

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before TUTTLE, RANDALL and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and that this cause be, and

the same is hereby remanded in part to the District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear his own costs on appeal in this Court.

September 22, 1980

Issued as Mandate: Oct. 14, 1980.

Reissued as Mandate: Nov. 5, 1980.

A true copy
Test

Clerk
U.S. Court of Appeals
Fifth Circuit

By /s/ Brenda Hauck
Deputy
New Orleans, Louisiana

APPENDIX J

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

October 27, 1980

GILBERT F. GANUCHEAU
Clerk

TEL 504—589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 78-3587—MARIANO S. FALCON v.
GENERAL TELEPHONE CO.
OF THE SOUTHWEST

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU
Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Mr. Stephen W. Holt
Mr. John E. Collins
Mr. Frank P. Hernandez
Mr. E. Russell Nunnally

APPENDIX K

U.S. Constitution, Amend. V, Due Process Clause:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Fed. R. Civ. P. 23(a):

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(b)(2):

> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

MAR 16 198
ALEXANDER L. ST
CLERK

NO. 80-1264

IN THE

Supreme Court of the United States

October Term, 1980

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

RESPONDENT WOULD STATE THE ISSUES AS FOLLOWS:

1. WHETHER "ACROSS THE BOARD" ATTACKS IN TITLE VII CASES ARE STILL ALLOWED AFTER THIS COURT'S DECISION IN *EAST TEXAS MOTOR FREIGHT SYSTEMS, INC. V. RODRIGUEZ*, 431 U.S. 395 (1977).

2. WHETHER RESPONDENT-FALCON PROVED THAT GENERAL TELEPHONE DISCRIMINATED AGAINST HIM IN HIS INDIVIDUAL PROMOTION CLAIM.

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NO. 80-1264

IN THE

Supreme Court of the United States

October Term, 1980

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, MARIANO S. FALCON, individually and as class representative, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 626 F.2d 369 (5th Cir. 1980).

STATEMENT OF THE CASE

Respondent is dissatisfied with Petitioner's "statement" as it omits material findings and conclusions made by the trial court.

At the conclusion of the phase I (liability) portion of the case, the trial judge on March 22, 1977, specifi-

cally found that Mariano S. Falcon "fairly and adequately"represents Mexican-Americans now employed and those who have applied for employment at General Telephone's Irving facility (see p. 37a, Appendix, General Telephone's Petition).

Previously, General Telephone was informed by the trial court that it could raise the " . . . issue of this provisionally-certified class during or after the presentation of the class claims and evidence at trial." (See p. 48a, Appendix, General Telephone's Petition).

With respect to Falcon's individual claim (based on discrimination in promotion) the trial court found, among other facts:

1. The supervisory personnel responsible for evaluating promotions were Caucasians (p. 33a, Appendix, General Telephone's Petition, finding #8).

2. "The criteria used to rate and to promote are subjective and are not based on objective criteria." (p. 33a, Appendix, General Telephone's Petition, finding #8).

3. Falcon had more seniority than those promoted over him. (p. 34a, Appendix, General Telephone's Petition, finding #10).

REASONS FOR DENYING THE WRIT

I. *EAST TEXAS MOTOR FREIGHT SYSTEMS, INC. V. RODRIGUEZ* DOES NOT PROHIBIT TITLE VII "ACROSS THE BOARD" ATTACKS ON DISCRIMINATORY EMPLOYMENT PRACTICES.

Unless this Court wishes to abolish or modify "across the board" attacks in Title VII cases there is no need

to grant the writ. There simply is no language in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), that says broad attacks in racial discrimination cases are outlawed, or even outmoded. Regardless of Petitioner's unclear position,[1] there is no conflict between the Fifth Circuit opinion in *Falcon* and *East Texas Motor Freight Systems, Inc. v. Rodriguez, supra.* This Court's opinion in *Rodriguez* did not prohibit "across the board" class action in Title VII cases. Rather, this Court held in *Rodriguez* that "a class representative must be part of the class and 'possess the same interest and suffer the same injuries' as the class members". *Id.* at 403. This conclusion was reached since the class representatives were found by the trial court and the court of appeals not to have suffered an injury as a result of alleged discriminatory practices.

Unlike *Rodriguez, Falcon* has suffered an injury as a result of unlawful employment discrimination. The Fifth Circuit correctly found that there was a sufficient nexus between the Plaintiff's claims and those of the class to satisfy the requirement of Rule 23 and, that such a finding, to allow a Plaintiff to represent a class suffering from a common discriminatory complaint, was consistent with the holding in *Rodriguez* and the policy of Title VII. 626 F.2d at 375.

Petitioner's argument that the Fifth Circuit's decision in *Falcon* conflicts with this Court's holding in *Rodriguez* is tantamount to arguing that *Rodriguez*

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[1] Petitioner argues that *Rodriguez* "* * * precludes the continued use of the across the board approach to class actions." (Petition, p. 7) And, near the end of its Petition says: "Finally, petitioner is not asking that this court end broad-based class actions in employment discrimination cases." (Petition, p. 17)

mandates an automatic rule that a victim of a policy of discrimination by an employer cannot represent other victims of the same policy unless their positions and specific injuries are identical. Such a result would allow Rule 23 requirements to defeat the policy behind Title VII, a result that is not present in the holding of *Rodriguez.*

The Fifth Circuit, in its decisions since *Rodriguez,* has addressed the issue of "across the board" attacks on discrimination in a manner consistent with Title VII policy and the holding in *Rodriguez. Satterwhite v. City of Greenville,* 578 F.2d 987 (5th Cir. 1978), *vacated and remanded on other grounds,* 445 U.S. 940 (1980); and, *Payne v. Travenol Laboratories, Inc.,* 565 F.2d 895 (5th Cir.) *cert. denied* 439 U.S. 835 (1978). In *Satterwhite, supra,* the Fifth Circuit made the same distinction that has been made in *Falcon* in stating that *Rodriguez* involved named plaintiffs who lacked a nexus with the class as a result of the lack of merit of their individual claims and the *Rodriguez* opinion was not contrary to the policy favoring "across the board" Title VII class actions. *Satterwhite, supra,* at 993 n.8. In *Payne v. Travenol, Inc., Supra,* at 900, the Fifth Circuit specifically addressed the issue raised by the Petitioner and held that,

> "Plaintiffs' action is an 'across the board' attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies."

The policy behind these decisions are mandated by the purpose of Title VII. Rule 23 must not be read in a vacuum, but rather, against the nature and purpose of the substantive law of plaintiff's claim. *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74 (N.D. Tex. 1979). "Congress intended Title VII to be a broad, remedial measure aimed at eliminating the widespread discriminatory employment conditions that have a destructive impact not only on those 'forced into a condition of marginal existence' but also on the nation as a whole deprived of the talents of the victims of discrimination." *Quigley, supra* at 78, citing [1964] U.S. Code Cong. & Admin. News, pp. 2355, 2514; See *Id.* at 2525, 2516; H.R. Rep. No. 914; *Id.* at 2393; S. Rep. No. 872; *Id.* at 2377. See also, *Cooper v. University of Texas at Dallas*, 482 F.Supp. 187, 192 (N.D. Tex. 1979), and *Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420, 432-33 (N.D. Tex. 1979).

As a result of the purpose behind Title VII, Rule 23 standards must be given sufficient breadth to carry out congressional goals. The Fifth Circuit's opinion in *Falcon* allows this breadth in view of the particular facts of the case. This is not in conflict with *Rodriguez* and to hold otherwise would forbid "across the board" attacks against discriminatory employment practices with the practical results of defeating class actions under Title VII in most circumstances, regardless of the facts.

II. THE FIFTH CIRCUIT'S HOLDING IN *FALCON* DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *GENERAL TELEPHONE COMPANY OF THE NORTHWEST* OR WITH

THE THIRD CIRCUIT'S DECISION IN *SCOTT V. UNIVERSITY OF DELAWARE.*

After a careful review of the trial court evidence the Fifth Circuit concluded (as did the trial court) that Falcon adequately represented the class with respect to both hiring and promotional discrimination claims. A sufficient nexus was demonstrated between his claim of promotional discrimination and the other class members' claims of hiring discrimination. Falcon and the class members suffered from the same injury, namely, employment discrimination because of national origin.

The Fifth Circuit's holding in *Falcon* does not conflict with decisions of this Court or those of other Courts of Appeals. In *General Telephone Company of the Northwest v. Equal Employment Opportunity Commission*, 100 S.Ct. 1698 (1980) this Court was not concerned with "across the board" attacks or their use in employment discrimination cases. Rather, in very explicit language, this Court ruled that the EEOC may maintain a Title VII enforcement action without first obtaining class certification pursuant to Rule 23. 100 S.Ct. at 1708.

In passing on this issue, in dicta, this Court did observe several problem areas in dealing with Rule 23. It was noted that conflicts *might* arise between employees and applicants if they are competing for fringe benefits or seniority, 100 S.Ct. at 1707. Under those circumstances the same plaintiff *might* not be able to represent different classes. The mere observation about problems that conceivably could arise in Title VII class litigation fails to rise to the status of a "conflict" with the Fifth Circuit's decision in this case. There

simply is no conflict between *Falcon* and *General Telephone Company of the Northwest.*

Likewise, *Scott v. University of Delaware*, 601 F.2d 76 (3rd Cir.) *cert. denied*, 444 U.S. 93 (1979) raises no conflict with *Falcon* since a concurring opinion clearly said, 601 F.2d at 92, that the ruling in that case was not intended to represent a constriction upon the availability of the class action device in suits charging "across the board" discriminatory employment practices.[2] In *Scott* there was a clear conflict on the part of the class representative which simply did not arise in the instant case. The Fifth Circuit observed that Falcon showed more than an alliance based simply on the same type of discriminatory claim. "He also showed a similarity of interests based on job location, job function and other considerations."

Petitioner's analysis of the issues simply fails to explain how *General Telephone Company of the North-West* and *Scott v. University of Delaware* conflict with Falcon's theory of an "across the board" attack. Respondent submits the writ should be denied because there is no substantial conflict that would warrant the court's attention.

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[2] General Telephone (p. 12, Petition) conveniently overlooked that portion of the *Scott* decision. In fact, one of the commentators on which Petitioner relied heavily (pp. 6, 14, 17, Petition) cites *Scott* as authority for a liberal certification trend even after Rodriguez! Rutherglen, Title VII Class Actions, 47 U.Chi.L.Rev. 688, 723, n. 210 (1980).

III. FALCON PROVED THAT GENERAL TELEPHONE DISCRIMINATED AGAINST HIM IN HIS INDIVIDUAL PROMOTION CLAIM EVEN UNDER THE RECENTLY ANNOUNCED *BURDINE* STANDARDS.

This Court's ruling in *Texas Department of Community Affairs v. Burdine*, ____ U.S. ____ 49 U.S.L.W. 4214 (U.S. March 3, 1981) does not require reversal of the instant case. Plaintiff in *Burdine* failed to carry her burden of proof in the trial court and did not establish discrimination in either the promotion or termination decisions involved in her case. Falcon, on the other hand, did obtain findings of fact and conclusions of law establishing discrimination in promotional conduct by General Telephone. Petitioner, therefore, simply failed to persuade the trial judge that its proferred explanations for not promoting Falcon were not pretextual.

This Court stated that Burdine could have carried the burden of persuasion in her case in one of two ways, 49 U.S.L.W. at 4216:

> "She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, supra, at 804-805."

There is ample evidence in this record, all noted in the Fifth Circuit's opinion, that the trial judge simply felt that General Telephone's explanations were indeed pretextual. Under these circumstances, Petitioner has failed in its efforts to show that the trial court's findings are clearly erroneous as required by Fed.R.Civ.P. 52(a).

CONCLUSION

Petitioner has presented no basis for asserting a conflict between this Court's decisions and the Fifth Circuit's holding in the instant case. The petition should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

No. 80-1264

MAR 17 1981

ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY MEMORANDUM

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Scott v. *University of Delaware*, 601 F.2d 76 (3rd Cir.), *cert. denied*, 444 U.S. 93 (1979)	1, 2
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1264

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Petitioner,

v.

MARIANO S. FALCON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY MEMORANDUM

I. THE PROPER SCOPE OF THE CLASS [1]

Respondent Falcon, in his opposing brief in No. 80-1264, asserts that there is "no need" for this Court to grant the petition for a writ of certiorari in this case unless the Court "wishes to abolish or modify 'across the board' attacks in Title VII cases." Respondent further asserts that there is "no substantial conflict that would warrant the court's attention," arguing that there is no conflict between the decision of the court of appeals in the instant case and the decision of the Third Circuit in *Scott* v. *University of Delaware*, 601 F.2d 76 (3d Cir.), *cert.*

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[1] The parent company and affiliates of General Telephone Company of the Southwest are listed in the Petition for a Writ of Certiorari at p. ii.

denied, 444 U.S. 93 (1979). The sole basis for this argument is that a concurring opinion in *Scott* stated that the majority opinion did not constrict the availability of the class action device in employment discrimination cases where "across the board" discrimination is alleged.

In fact, General Telephone's petition for certiorari clearly demonstrated that the decision of the Fifth Circuit in this case is squarely in conflict not only with the decision of the Third Circuit in *Scott*, but also with the decisions of the First Circuit in *DeGrace* v. *Rumsfeld*, 614 F.2d 796, 809-10 (1st Cir. 1980), and the Fourth Circuit in *Hill* v. *Western Electric Co.*, 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979).[2] In each of these cases the courts of appeals declined to allow a current employee to represent a class of unsuccessful applicants, because the claims of the purported class representative would not be typical of the claims of the class as required by rule 23(a). The Fifth Circuit allowed precisely this sort of representation in the present case, eliminating the need for an inquiry into typicality by an application of the "across the board" theory.

Moreover, the decision of the Fifth Circuit also obviously conflicts with the opinion of this Court in *General Telephone Co. of the Northwest, Inc.*, 100 S. Ct. 1698 (1980). There the Court stated that where, as here, there is a potential conflict of interest between unsuccessful applicants and employees, "Under Rule 23, the same plaintiff could not represent these classes." *Id.* at 1707. Given this conflict and the conflict among the courts of appeals, there is a compelling need for granting the petition for a writ of certiorari in order to definitively re-

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[2] The conflict between the circuits is clear, as noted in two recently reported opinions. *See* Fields v. Village of Skokie, 502 F. Supp. 456, 460-61 (N.D. Ill. 1980) (rejecting "minority" view of Fifth Circuit); Gilchrist v. Bolger, 25 Fair Empl. Prac. Cas. 67, 70 (N.D. Ga. Feb. 18, 1981).

solve this important and recurring issue of the proper scope of class actions in employment discrimination cases.

II. THE INDIVIDUAL BURDEN OF PROOF ISSUE

The district court in this case ruled that General Telephone had discriminated against the named plaintiff by promoting non-Mexican Americans instead of the plaintiff. Although the district court did not set forth the evidentiary burdens it placed upon the plaintiff and defendant in reaching this decision, the court of appeals affirmed because it would not have been clearly erroneous for the district court to have concluded "that Falcon was *as qualified* as the other people who were promoted." 626 F.2d at 379; pet. app. at 18a (emphasis added). This finding alone, under then-prevailing Fifth Circuit precedent, would have been sufficient to sustain the district court's decision on appeal. *See id.*

In *Texas Dep't of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214 (U.S. March 4, 1981), this Court made it clear that, contrary to the Fifth Circuit rule, the defendant in an individual employment discrimination case is not required to "show that the plaintiff's objective qualifications were inferior to those of the person selected." *Id.* at 4217. Instead, if candidates are *equally* qualified, the employer has discretion to choose any candidate so long as the choice is not based on unlawful criteria. *Id.* Thus, because the district court may have erred as a matter of law by ruling in Falcon's favor simply because it found him to be as well qualified as those actually promoted, the decision of the court of appeals on the individual claim of Falcon should ultimately be vacated and remanded to the court of appeals, with instructions that the case should be returned to the district court for additional findings of fact and conclusions of law adequate to determine whether Falcon has satisfied the evidentiary burden set forth in *Burdine*.

Such a remand should *not*, however, be ordered forthwith. Instead, the Court should grant the petition but set only the class certification issues for oral argument.

An immediate remand would be inappropriate for two reasons. First, the need to determine whether the initial certification of the class was proper could not be eliminated by a decision by the trial court on remand that Falcon's individual claim was meritless. *See East Texas Motor Freight Co.* v. *Rodriguez*, 431 U.S. 395, 406 n.12 (1977). Second, whether the district court utilized the proper burden of proof in ruling upon Falcon's individual claim of *disparate treatment* in promotions is not relevant to whether the trial court correctly analyzed the hiring claims of the class, which are premised on a *disparate impact* theory. Thus, the important issues presented by the Fifth Circuit's holding that the class was properly certified in this case cannot be resolved by vacating and remanding for reconsideration in light of *Burdine*.

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